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90-863

CASE NUMBER:

THE SUPREME COURT OF THE UNITED STATES

TERM COMMENCING OCTOBER 1, 1990

SABAT QUINONES CANDELARIO,

PETITIONER

vs.

POSTMASTER GENERAL OF THE UNITED STATES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court is required to enforce the award of back pay contained in an Equal Employment Opportunity Commission ("EEOC") Final Decision favorable to a federal employee, who had been unlawfully discharged because of his handicap or whether it has discretion to allow a trial de novo on the affirmative defense of failure to mitigate which was or could have been litigated in the administrative proceeding on the grounds that, although the doctrine of administrative res judicata was applicable, public policy and manifest injustice are exceptions to it?

2. If, after an evidentiary hearing and administrative appeal, the EEOC issues a Final Decision finding that a federal employee has been unlawfully discharged due to his handicap and should be

reinstated with back pay from the date of discharge to the date of reinstatement, the federal employer, who has not moved for reconsideration of that EEOC Final Decision but has instead given notice that it would comply with it, can then refuse to perform the ministerial function of calculating the exact dollar amount awarded and wait until an enforcement action is brought in District Court to try to prove the affirmative defense of failure to mitigate?

3. Whether a federal employee who has brought an action to enforce an EEOC Final Decision awarding him back pay from the date of discharge to the date of reinstatement can be said to be a "prevailing party" for attorneys' fees purposes when he was successful in having the District Court order his federal employer to calculate the exact dollar

amount of that award, even though the District Court's summary judgment in his favor was reversed and remanded for purposes of determining whether that award should be reduced for failure to mitigate?

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Quinones Candelario v. Postmaster General of the United States, 715 F.Supp 414 (D.C.P.R. 1989), reversed and remanded, 906 F.2d 798 (1st Cir. 1990).

JURISDICTIONAL STATEMENT

Petitioner, Sabat Quinones Candelario, petitions this Court to review by writ of certiorari the judgment entered by the United States Court of Appeals for the First Circuit entered June 26, 1990 and rendered on September 4, 1990 the date the motion for rehearing and suggestion for rehearing en banc was denied. This Court has jurisdiction to review this judgment by writ of certiorari pursuant to 28 U.S.C. §1254.

STATUTES, REGULATIONS AND EXECUTIVE ORDERS WHICH THE CASE INVOLVES

The statutes, regulations and

executive order which the case involve are set forth verbatim in the appendix to this Petition and are cited and summarized below.

A. The Rehabilitation Act, 29 U.S.C. §701 et seq., specifically §791, prohibiting the United States Postal Service (the "Postal Service") from discriminating against handicapped persons in employment, and §794a, providing a handicapped person who has been discriminated against by the Postal Service with the same remedies, procedures and rights set forth in §717 of the Civil Rights Act of 1964 (42 U.S.C. §2000e-16), and providing for attorneys fees.

B. The Civil Rights Act of 1964, 42 U.S.C. §2000 et seq., specifically, §2000e-16(a), requiring all personnel actions affecting employees or applicants for employment...in the Postal

Service...to be made free from any discrimination on the basis of [handicap]; §2000e-16(b), giving the EEOC the authority to enforce the provisions of §2000e-16(a) through appropriate remedies, including reinstatement...with or without back pay, and to issue rules, regulations, orders and instructions as necessary to carry out its responsibilities and, providing that the head of...the Postal Service..."shall comply with such rules, regulations, orders, and instructions...."; §2000e-16(c) allowing a handicapped employee who has been aggrieved by a final decision or a failure to take action on his discrimination complaint, brought either pursuant to §2000e-16(a) or pursuant to Executive Order 11478, to file a civil action against the ... Postmaster General of the United States.

C. Executive Order 11478 prohibiting the Postal Service from discriminating against the handicapped in employment, requiring the Postal Service to provide for the processing of complaints of handicap discrimination, authorizing the EEOC to implement the policy on non-discrimination against the handicapped and ordering the Postmaster General of the United States to comply with the EEOC's rules, regulations, orders and instructions.

D. 29 C.F.R. Part 1613, EEOC regulations providing the procedure to be followed in cases of employment discrimination by... the Postal Service, specifically, Sub-Part G, section 1613.703, requiring the Federal Government to become a model employer of handicapped persons and prohibiting discrimination on the basis of handicap, and sections

1613.708 and 1613.709, providing that complaints of discrimination against individuals on the basis of handicap must be processed in accordance with Sub-Part B, sections 1613.213 through 1613.283.

E. 29 C.F.R. Part 1613, Sub-Part B, specifically, sections 1613.213 through 1613.283, providing the procedure to be followed in processing a discrimination complaint, the relevant steps of which were followed in this case as set forth more particularly in the STATEMENT OF FACTS, below.

F. Appendix A to Part 1613, 29 C.F.R. 1613, providing that back pay must be awarded and specifying what constitutes back pay and how it must be computed and, most relevantly, providing for inquiry as to and set off for interim earnings in mitigation.

G. The Mandamus Statute, 28 U.S.C.

§1361, providing that the District Courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

H. The Administrative Procedure Act, specifically, 5 U.S.C. §703, providing for judicial enforcement of agency action.

STATEMENT OF THE CASE

Sabat Quinones Candelario, the plaintiff below and the petitioner here ("Quinones"), sought to enforce a Final Decision of the EEOC awarding him back pay in the United States District Court for the District of Puerto Rico. The District Court had jurisdiction to entertain the complaint pursuant to 29 U.S.C. §794a, 42 U.S.C. §2000e-16(c), 5 U.S.C. §703, and 28 U.S.C. §1361.

The Administrative Proceedings

Quinones, a disabled Vietnam veteran, was hired as a postal clerk by the Postal Service in Puerto Rico on or about August 8, 1979. A-5, A-23, A-64. On September 6, 1979, Quinones was examined by Dr. Echavarria, the Postal Medical Officer, who determined that Quinones was medically unsuitable for the position of part time flexible clerk. Quinones was discharged as a result of Dr. Echavarria's findings on that same day. A-5, A-24, A-64,65.

Quinones followed all appropriate administrative procedures set forth in 29 C.F.R. Part 1613, specifically, Sub-Part G, section 1613.703 and sections 1613.708 and 1613.709 (providing that complaints of discrimination on the basis of handicap must be processed in accordance with Sub-Part B, sections 1613.213 through 1613.283). A-25.

He first sought informal counseling with a Postal Service employee designated an Equal Employment Opportunity Counselor, and, when unsuccessful in obtaining relief there, filed a formal complaint. A-24. (29 C.F.R. §§1613.213,214). The complaint was then properly investigated and the investigative file was reviewed by Quinones. (§1613.216).

At this point, the Postal Service and Quinones entered into the informal settlement negotiations referred to in §1613.217(a) as an "informal adjustment of the complaint." "An informal adjustment of a complaint may include an award of back pay, attorney's fees or other appropriate relief." As an adjustment was not arrived at, the next step was to hold an evidentiary hearing presided over by an EEOC administrative judge.

After the hearing, the administrative

judge found in Quinones's favor. (§1613.218). The Postal Service, however, rejected that finding and Quinones appealed the Postal Service's final agency decision to the EEOC[1]. (§1613.221, 231). A-25. The EEOC then reviewed the entire complaint file, including the investigative file, documentation of the attempt to adjust the complaint, the transcript of the hearing, and all recommendations and decisions. (§1613.222).

On April 8, 1985, the EEOC issued its Final Decision in Quinones's favor, and ordered the Postal Service to reinstate Quinones with back pay from the date of his illegal discharge to the date of reinstatement. A-6, A-25, A-63.

The Postal Service did not move for

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[1]Technically, the appeal was taken to the EEOC Office of Appeals and Review.

reconsideration of that EEOC Final Decision. On the contrary, on June 7, 1985, the Postal Service sent Quinones a letter indicating that it would abide by the EEOC Final Decision. That letter informed Quinones that the Postal Service would reinstate him and would also process his back pay claim. A-6, A-26.

Quinones was reinstated on June 22, 1985, but has not yet received back pay. A-22,23,26.

By letter dated September 17, 1985, the Postal Service requested Quinones to submit information as to interim earnings. Quinones complied with that request. A-26,27.

On December 30, 1985, the Postal Service requested additional information. Quinones complied with that request. A-27,28.

By letter dated March 5, 1986, the

Postal Service denied that it owed Quinones back pay, but gave Quinones an opportunity to submit additional information and to file a grievance under the grievance/arbitration procedure. Quinones did both. In addition, on March 27, 1986, Quinones sent a copy of all correspondence between himself and the Postal Service pertaining to the back pay claim to the EEOC and requested that agency to enforce compliance. A-28,29.

On May 13, 1986, the EEOC informed the Postal Service that it had sufficient information to determine the amount of the back pay due Quinones and demanded a response in ten days. A-29. On May 22, 1986, the Postal Service responded to the EEOC and asserted that no back pay was due to Quinones because he had not made reasonable efforts to obtain employment. A-29,30. On August 18, 1986, Quinones

submitted additional information to both the Postal Service and to the EEOC to show that he had made a reasonable effort to obtain employment during the period between his termination from and his reinstatement to the Postal Service. A-30.

On September 22, 1986, the EEOC notified the Postal Service that it had sufficient information to enable it to make a back pay determination and demanded that it take action on the claim within 30 days.

On January 8, 1987, the EEOC gave notice that it would forward a report of non-compliance if the Postal Service did not compute a backpay award. A-83. On January 30, 1987, the Postal Service informed the EEOC that it rejected Quinones's back pay claim entirely. A-31.

Meanwhile, the Postal Service had

also denied each of Quinones's grievances under the collective bargaining agreement at the step before arbitration.[2] A-31.

The District Court Proceedings

Quinones brought this action in the District Court to enforce the EEOC Final Decision awarding him back pay and ordering the Postal Service to compute the amount owed.[3] A-22.

The Postal Service did not raise failure to mitigate as an affirmative defense in its answer to Quinones' complaint in the District Court. R.6. Quinones moved for summary judgment. The Postal Service defended on the ground that it was entitled to present evidence

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[2]The parties agreed to suspend the grievance procedure pending resolution of the judicial enforcement action.

[3]The EEOC's own compliance and enforcement procedures ceased when Quinones brought this judicial enforcement action.

showing that no back pay was due because Quinones had failed to mitigate his damages.

Copies of all the information which Quinones had submitted to the EEOC and to the Postal Service to show mitigation, consisting of pages and pages of handwritten notes detailing the dates, names and places of jobs sought, business cards of people contacted, and want ads, was made a part of the court file before the District Court. In addition, transcripts of depositions taken in preparation for the trial in the District Court were filed in support of the motion for summary judgment.

Quinones was not offered any position that was substantially equivalent to the position from which he was discharged by the Postal Service during the period from his discharge to his reinstatement.

According to the deposition transcript of the Postal Service's own expert witness, Edna Segarra Armstrong, a Social Security Vocational Expert, there were no substantially equivalent positions available in Puerto Rico during the period in question.

In fact, she testified that she did not know of any specific job Quinones could have received during the years in question.

Her deposition testimony was that the economy in Puerto Rico during the years 1979 through 1985 was terrible, that unemployment was high, that although there were clerical jobs available, they paid much less than his job at the Postal Service, and in any event were not offered to Quinones. She further testified that his VA rehabilitation counselor did everything possible to help Quinones get

a new job, but was unsuccessful.

It was stipulated that Quinones submitted numerous documents showing his efforts to find employment. Joseph Leahy, the Postal Service employee charged with the responsibility for evaluating those documents and the person who wrote the January 30, 1987 letter to the EEOC which stated that no back pay would be awarded because the documents were suspect, testified in deposition that he had made no effort to verify or disprove their contents prior to making the determination not to award any back pay and writing that letter.

Mr. Leahy stated that in November, 1988, after the enforcement action was commenced in the District Court, he did try to verify the contents of some of the documents but he still could not swear that Quinones had not made all the job

getting efforts he claimed to have made.

The District Court held two pre-trial conferences. A-31. As a result, the Postal Service was ordered to comply with Quinones's discovery request by computing the gross amount of back pay due and to make the computation available to Quinones. The Postal Service complied with that order.

Subsequently, the District Court gave the parties telephone notice that it had granted a partial summary judgment on the issue of liability to Quinones, but that the issue of damages would be tried as scheduled. A-61. Neither party at the time of trial knew the basis for the District Court's order granting the partial summary judgment on the liability issue. Both parties, however, had every reason to assume that although the District Court had determined that the

Postal Service was liable for some back pay, the exact amount was still subject to proof.

At the trial, instead of presenting evidence or witnesses to show by what amounts the gross amount of backpay should be reduced or in any way trying to prove the affirmative defense of failure to mitigate, the Postal Service stipulated to an amount of back pay to be awarded. A-44, 45.

Subsequently, the District Court issued its written opinion stating that the doctrine of administrative res judicata required it to enforce the EEOC Final Decision in Quinone's favor and awarding the exact amount of back pay stipulated to be due. A-22. The District Court also entered an order awarding attorneys' fees to counsel for Quinones. A-47.

The United States Court of Appeals for the First Circuit Proceedings

The United States Justice Department, representing the Postmaster General of the United States, appealed on the ground that the partial summary judgment wrongfully precluded the Postal Service from presenting evidence to show that Quinones had not mitigated the damages. The United States Court of Appeals for the First Circuit (the "First Circuit") vacated the District Court judgment and remanded.

The First Circuit held that the doctrine of res judicata was applicable in this enforcement action, but nevertheless, reversed the summary judgment on two grounds: (1) that public policy and a result of manifest injustice were exceptions to the doctrine of res judicata and (2) that it is the agency and not the EEOC which, in the first instance, should

determine the specific amount of back pay due to a employee and that this determination should be made during the compliance stage of the administrative proceeding which occurs after the EEOC Final Decision is issued. The First Circuit also reversed the order awarding attorneys' fees to Quinones holding that Quinones was not the prevailing party.

ARGUMENT

This case presents an issue of first impression to this Court which can affect thousands of employees of the federal government. Reduced to its simplest and broadest terms, the issue is who determines what remedy should be given to an employee of the federal government who has been unlawfully discriminated against, the EEOC or the federal agency which did the discriminating? Two branches of the federal government, the legislative and

the executive, have already answered that it should be the EEOC. See, 42 U.S.C. §2000e-16(b) and Executive Order No. 11478. The third branch of government, the Courts, are now split. Compare Quinones Candelario v. Postmaster General of the United States, 906 F.2d 798 (1st Cir. 1990), the judgment for which review is sought, with Moore v. Devine, 780 F.2d 1559 (11th Cir. 1986), Houston v. Nimmo, 670 F.2d 1375 (9th Cir. 1982), Pecker v. Heckler, 801 F.2d 709, 711 n.3 (4th Cir. 1986), and Haskins v. U.S. Department of Navy, 808 F.2d 1192 (6th Cir. 1987).

In order to address the issue, this Court must also resolve a conflict among the circuits, and between the First Circuit and the opinions of this Court, by clarifying that the doctrine of res judicata which must be applied without exception to judicial determinations must

be just as remorselessly applied to administrative determinations.

We urge this Court to grant this Petition for a Writ of Certiorari in order to clarify the relative duties of the agencies of the federal government in remedying unlawful discrimination in employment of federal employees and the role of the federal courts in the process. We also urge this Court to grant the Writ so that Quinones may at last benefit from the EEOC Final Decision awarding him back pay from the date of his unlawful discharge to the date of his reinstatement.

First, it is relevant to point out that Congress established two schemes to eliminate employment discrimination: one applicable to employees of private and state employers ("private employees"), 42 U.S.C. §2000e-5, and one applicable only

to employees of the federal government, including the Postal Service ("federal employees"), 42 U.S.C. §2000e-16. Loeffler v. Frank, 108 S.Ct. 1965 (1988); Moore, supra; Nimmo, supra. Although the EEOC plays a role in both schemes, its duties and powers are different.

When a private employee brings a charge of employment discrimination, the EEOC may investigate the charge, and seek to conciliate a settlement. 42 U.S.C. §2000e-5(b). It does not, however, have the power to hold an evidentiary hearing or to order a remedy. Only the courts have that power. 42 U.S.C. §2000e-5(f),(g). Thus, the EEOC may bring suit, or give permission to the private employee to bring suit, if a settlement cannot be reached. Id. The EEOC determination of whether there is reasonable cause to believe unlawful discrimination occurred

is not binding and the private employee receives a full trial de novo on the merits in the District Courts. McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). The private employer may raise failure to mitigate as an affirmative defense to an award of back pay during the trial. Wheeler v. Snyder Buick, Inc., 794 F.2d 1228 (7th Cir. 1986); Taylor v. Philips Industries, Inc., 593 F.2d 783 (7th Cir. 1979); Rasimas v. Michigan Department of Mental Health, 714 F.2d 614 (6th Cir. 1985).

The situation is different for federal employees. The EEOC has the power and the duty to hold an evidentiary hearing and to order remedial action, and further to review the final decisions of the federal employer. See 42 U.S.C. §2000e-16 and 29 C.F.R. Part 1613, Sub-Parts G and B, and Appendix A to Part

1613. The federal employers are required to abide by the EEOC determinations. 42 U.S.C. §2000e-16(b); Executive Order No.11478; 29 C.F.R. Part 1613, §1613.237; Pecker, supra. The federal employee who is not successful at the EEOC has the same right as a private employee to seek a de novo trial on the merits of his claim in the District Court. Chandler v. Roudebush, 425 U.S. 840 (1976); Loeffler v. Frank, supra. The federal employee who is successful at the EEOC, however, does not go to the District Courts for a trial on the merits; he goes to enforce the remedy awarded to him after having already prevailed on the merits, at both the administrative trial and appellate levels. An enforcement action, unlike an action brought on the merits, does not require the District Court to conduct a trial de novo. A federal employee can request a

federal court to enforce a favorable EEOC order without having to risk a de novo review on the merits. Haskins, supra. In an enforcement action, unlike an action on the merits, the provisions of 42 U.S.C. §2000e-5(f) through (k) are not applicable. In an enforcement action, the District Court merely requires the federal employer to do that which the EEOC, acting in a judicial capacity, has already determined should be done. 5 U.S.C. §703; 28 U.S.C. §1361. The federal employer cannot challenge issues decided against it when the federal employee does not seek de novo review. Haskins, supra. As to federal employees, Congress provided for a careful blend of administrative and judicial enforcement powers. Brown v. Gen'l. Services Administration, 425 U.S. 820, 833 (1976).

If the First Circuit's opinion is

left to stand, that careful blend will turn into a tangled mess. There will never be any incentive to the agencies of the federal government to comply with a Final Decision of the EEOC. The agencies will simply stonewall the employees and the EEOC, as the Postal Service did in this case, until the employee brings an enforcement action in the district court. At that point, the agency will insist on a trial de novo of its defenses, and the entire administrative proceeding will have been in vain. It was never the intent that the mandatory administrative procedure should be used as a stalling tactic to discourage federal employees from complaining about discrimination. On the contrary, the scheme was to make the federal government a model for employment of the handicapped and to entrust the implementation of that model to the EEOC

with the requirement that the agencies comply with its decisions. 42 U.S.C. §2000e-16; Executive Order No. 11478; 29 C.F.R. Part 1613, Sub-Parts G and B; Haskins, supra. Judicial review de novo was reserved only for the employee who did not receive a favorable EEOC Final Decision. As to those that did, judicial enforcement is mandatory. Moore supra; Nimmo, supra; Pecker, supra; and Haskins, supra.[4]

The Opinion of the First Circuit which we seek to have reviewed is not only in conflict with decisions of the Fourth, Sixth, Ninth and Eleventh Circuits holding that judicial enforcement of EEOC

[4]Quinones is frankly confused by the Justice Department's bringing of the appeal to the First Circuit since its duty is to implement the EEOC Final Decision, not to repudiate it as it is, in effect, doing here. S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972).

decisions in favor of a federal employee is mandatory, Moore, supra; Nimmo, supra; Pecker, supra; and Haskins, supra, it is also in conflict with the opinions of this Court which have held that there is no exception to the doctrine of res judicata. See, e.g. Federated Department Stores, Inc. v. Moitie, 452 U.S. 392 (1981).

First, there is no question but that the courts below were correct in holding that the doctrine of res judicata is applicable here.[5] The issue is, once having determined that the doctrine of res judicata is applicable, whether a federal court has discretion to disregard it. The

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[5] University of Tennessee v. Elliott, 478 U.S. 788 (1986); Federated Department Stores, Inc. v. Moitie, 452 U.S. 392 (1981); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 414 (1971); United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966); Commissioner of Internal Review v. Sunnen, 333 U.S. 591 (1948); Cromwell v. County of Sac, 94 U.S. 351 (1876).

First Circuit has answered that question in the affirmative. In so doing, it has placed itself in direct conflict with Federated Department Stores, Inc. v. Moitie, supra; Kremer v. Chemical Construction Corporation, 456 U.S. 461 (1982); United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966); and University of Tennessee v. Elliott, 478 U.S. 788 (1986); as well as with its own previous decisions which held that there were no exceptions to the res judicata doctrine.[6]

In the Moitie case, this Court resolved a conflict among the circuits as

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[6] Vilanova v. United States, 851 F.2d 1 (1st Cir. 1988); McCuin v. Secretary of Health and Human Services, 817 F.2d 161 (1st Cir. 1987); Rhode Island Hospital Trust National Bank v. The Ohio Casualty Insurance Company, 789 F.2d 74 (1st Cir. 1986); Rose v. Town of Harwick, 778 F.2d 77 (1st Cir. 1985); Lyle v. Bangor & Aroostook Railroad Company, 237 F.2d 683 (1st Cir. 1956)

to whether public policy and simple justice were exceptions to the doctrine of res judicata. This Court held that they were not. As to the exception of "simple justice," this Court stated, "The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." This Court pointed out that in an earlier case, Reed v. Allen, 286 U.S. 191 (1932), it had considered the doctrine of res judicata so inviolable that it had allowed the inequitable result of leaving one person in possession of real property with another person entitled to the rents rather than make an exception. This Court held that the Ninth Circuit's reliance on public policy was similarly misplaced. It stated, "This Court has long recognized that public policy dictates that there be an end of

litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." Lest there be any doubt that "manifest injustice" as opposed to "simple justice" could be considered a cause for disregarding the doctrine of res judicata, this Court went even further and stated, "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.'" Id. at 401, quoting Heiser v. Woodruff, 327 U.S. 726 (1946).

The Moitie case effectively overruled those decisions relied on by the First Circuit from other circuits which had preceded it and which had contained dicta that public policy exceptions could be made to the doctrine of res judicata when

applied to decisions of administrative agencies acting in a judicial capacity. In point of fact, none of the cases relied on by the First Circuit in its opinion actually made a public policy or injustice exception to the doctrine of res judicata. In Tipler v. E.J. duPont de Nemours and Co, 443 F.2d 125 (6th Cir. 1971), although the decision contained dicta that res judicata should not be rigorously applied to administrative decisions, the actual holding of the court was that the technical requirements of res judicata had not been met. In International Harvestor Co. v. Occupational Safety and Health Review Commission, 628 F.2d 982 (7th Cir. 1980), although again there was dicta that res judicata should not be rigidly applied to administrative decisions, the actual holding of the court was that res judicata did not apply because the agency had not

been acting in a judicial capacity. In Gregory v. Bowen, 844 F.2d 664 (9th Cir. 1988), although again the dicta was repeated, the court actually held that the administrative decision was not res judicata because a new and different claim was presented. In Marlene Industries Corporation v. National Labor Relations Board, 712 F.2d 1011 (6th Cir. 1983), the court actually enforced an administrative decision on the grounds of res judicata.

We have been unable to find any federal cases at all which were decided after Moitie and which refused to apply the doctrine of res judicata, after first determining that it was applicable, on the grounds of public policy, manifest injustice or any other grounds.

On the contrary, since Moitie, the trend has been to apply the doctrine of res judicata remorselessly. See e.g.,

Westwood Chemical Co., Inc. v. Kulick, 656 F.2d 1224 (6th Cir. 1981)(neither public policy nor manifest injustice are exceptions to the doctrine of res judicata); United States v. Keane, 852 F.2d 199 (7th Cir. 1988)(there are no exceptions to the doctrine of res judicata except, in certain limited criminal cases, for the extraordinary writs of habeas corpus and coram nobis); Shaver v. F.W. Woolworth Co., 840 F.2d 1361 (7th Cir. 1988)(public policy is not an exception to the doctrine of res judicata); Salveson v. Western States Bankcard Association, 731 F.2d 1423 (9th Cir. 1988)(there are no exceptions to the doctrine of res judicata).

Moreover, this Court has consistently held that the doctrine of res judicata is as applicable to determinations made by administrative agencies acting in a

judicial capacity as it is to determinations made by courts. See Kremer v. Chemical Construction Corporation, supra, (reaffirming the holding in United States v. Utah Construction & Mining Co., supra, that the doctrine of res judicata is applicable to administrative decisions and going further to hold that when Congress has permitted a tribunal other than the federal courts to exercise the power of adjudication and to impose sanctions in Title VII cases, then the exercise of that power is res judicata even for the federal courts even when the other tribunal is a state agency and the state court has merely reviewed it and not conducted a trial de novo); University of Tennessee v. Elliott, supra, (the holding in Kremer, supra is equally applicable to federal agencies as it is to state agencies).

The opinion of the First Circuit is also in direct conflict with its own earlier opinion in McCuin v. Secretary of Health and Human Services, 817 F.2d 161 (1st Cir. 1987). In that case, the First Circuit refused to find any exceptions to the doctrine of res judicata when applied to the final decision of an administrative agency acting in a judicial capacity. In McCuin, the First Circuit stated that the "principle of finality [is] essential to the maintenance of social order."

The McCuin case, like the case at bar, raised the essential issue of due process which is at the heart of the res judicata doctrine. The wheels of justice turn slowly precisely so that the vehicle they carry may arrive at a sure destination. Having once safely traversed the bumpy and rocky paths which wind through the system in a maze of byzantine

curves around pitfalls laid as traps for the unwary, the litigants in the cart of justice should be allowed to alight with the knowledge that they need never again have to retrace the route of that arduous journey.

In McCuin, the claimant received a Final Decision from an agency but the agency reserved the right to change it any time over the next four years. In this case, Quinones also received a Final Decision from an agency, the EEOC, but the First Circuit has held that another agency, the agency against whom the Final Decision was entered, the Postal Service, could decide to change it at any time. In McCuin, the First Circuit held that such a lack of finality was a problem of substantive due process which in turn spawned a procedural due process problem: that is, how to word the notice of Final

Decision.

The notice of Final Decision in the case at bar did not contain a warning that the Postal Service could make the unilateral decision not to comply and that it could wait two years until an enforcement action was brought in the District Court to present its arguments and proof in support of that decision. On the contrary, the notice in the Final Decision in this case told Quinones that the Postal Service had thirty days in which to either seek reconsideration of the EEOC Final Decision or to signify that it would comply. Once the Postal Service gave notice that it would comply with the EEOC Final Decision, Quinones was entitled to rely on that decision. This Court should reaffirm its adherence to the "fundamental precept" that "finality of judgment is basic to every adjudicatory

system," McCuin, supra, whether the final judgment issues from an administrative proceeding or a court proceeding.

The First Circuit's decision not to follow the mandatory precedents of Federated Department Stores, Inc. v. Moitie, supra, Kremer v. Chemical Construction Corporation, supra, United States v. Utah Construction & Mining Co., supra, and University of Tennessee v. Elliott, supra, and instead to revive the discredited and outdated rule that public policy and manifest injustice are exceptions to the res judicata doctrine in order to promote administrative efficiency is simply not warranted by the facts of this case and, in the end, will cause more administrative inefficiency and clogging of the courts than now exists.

Even if public policy or injustice were exceptions to the doctrine of

administrative res judicata, which it is not, such exceptions should not be recognized in actions brought to enforce an EEOC Final Decision in favor of a disabled federal employee. To do so would be contrary to the Congressional and Presidential intent to make the federal government a self-governing model for employment of the handicapped. 29 U.S.C. §§791,794a; 42 U.S.C. §2000e-16; 29 C.F.R. 1613.703; Executive Order No. 11478. That is the declared public policy which this Court must uphold. Rosenfeld v. Department of Army, 769 F.2d 237, 240 (4th Cir. 1985).

Certainly, a mere unfair result in one case, which did not happen below anyway, would not rise to the level required for such an exception to apply. Moitie, supra. This is especially evident in light of this Court's strong language

in Moitie in favor of the doctrine of res judicata despite the result imposition of the doctrine entailed.

The result in Moitie, like the result in Reed v. Allen, supra, did seem to perpetuate an injustice. In that case, several plaintiffs had received an unfavorable decision from the district court. Most appealed, and eventually were successful in getting a reversal. One, however, elected not to appeal and instead sued in state court. The defendant was successful in removing the action to the district court which promptly dismissed it on the ground of res judicata. This time the plaintiff appealed and argued that since the original loss had been overruled on appeal as to the other plaintiffs, it would be unjust to deprive him of the benefit of that favorable decision. The Ninth Circuit agreed and held that public

policy and simple justice were exceptions to the doctrine of res judicata. This Court reversed. It stated, "this Court recognizes no general equitable doctrine, such as that suggested by the Court of Appeals, which countenances an exception to the finality of a party's failure to appeal." In the case at bar, the Postal Service failed to appeal, or move for reconsideration of, the EEOC Final Decision which awarded Quinones full back pay. It is well settled that an employer's failure to appeal a final administrative decision bars review of the issue by federal court. Vilanova v. United States, 851 F.2d 1,6n.21 (1st Cir. 1988).

Moreover, the facts in this case show that as between the Postal Service and Quinones, the only party who suffered injustice was Quinones. He was injured in

the course of serving his country, then unlawfully discharged from his job on account of that injury by the very government he had served, and has spent over ten years trying to get redress and a remedy for the wrong which was done him.

The First Circuit opinion confused the enforcement action in the District Court with the compliance stage of the administrative proceeding. Although the First Circuit opinion uses the words "enforcement" and "compliance" synonymously, in fact they are separate proceedings. Further, the ministerial function of calculating the exact dollar amount due was confused with the determination of the period of time to be covered by the award. The EEOC, acting in its judicial capacity, determines the latter and directs the federal agency to calculate the exact dollar amount required

to cover that time period. The federal agency cannot sit idly by through six years of administrative trial and appellate procedures, then after a decision adverse to it is issued, unilaterally decide on a different shorter time period or unilaterally decide that no back pay at all is due and so refuse to make any calculation at all. Yet, that is precisely what the Postal Service did in this case, and that is precisely what the First Circuit's opinion condones.

The application of the res judicata doctrine would not result in injustice if applied to the facts of this case because the administrative proceeding gave the Postal Service several opportunities to litigate the issue of failure to mitigate. Cromwell v. County of Sac, 94 U.S. 351 (1876). "The doctrine of res judicata applies not only to the points upon which

the tribunal "was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." Id. Surely, the amount of damages, or backpay, and any affirmative defense that would reduce the amount of damages, is a point properly belonging to the subject of litigation over employment discrimination. Indeed, the statutes and regulations make clear that it is.

Quinones followed the provisions of 29 C.F.R. Part 1613, Sub-Part B, specifically, sections 1613.213 through 1613.283. First, he sought informal counseling with a Postal Service employee designated an Equal Employment Opportunity Counselor, and, when unsuccessful in

obtaining relief there, he filed a formal complaint with the Postal Service official who had been designated to receive such complaints. The Postal Service then appointed one of its employees to investigate the allegations of the complaint. Quinones then reviewed the investigative file. At this point, the Postal Service, as required, gave Quinones the opportunity to enter into informal settlement negotiations (referred to in §1613.217(a) as an "informal adjustment of the complaint"). "An informal adjustment of a complaint may include an award of back pay, attorney's fees or other appropriate relief." The informal adjustment must be reduced to writing and is enforceable. This was the Postal Service's first opportunity to discover if Quinones had mitigated his damages and to make a calculation of back pay.

In this case, no adjustment was arrived at, and so the next step was to hold an evidentiary hearing presided over by an EEOC administrative judge. The administrative judge could have required further investigation prior to the hearing and, since pre-hearing discovery is provided for, the Postal Service could at this second opportunity have gathered its facts for a defense of failure to mitigate.

At the hearing, the administrative judge must bring out pertinent facts, including the production of pertinent documents, which may include comparative data, statistics, records, affidavits or the attendance of witnesses. Since the regulations require a remedy of back pay if discrimination is found to exist, this hearing was the time, and certainly at least the third opportunity, for the

Postal Service to carry its burden of proving, as an affirmative defense, that Quinones had failed to mitigate.

After the hearing, the administrative judge forwarded his findings, analysis and recommendations to the Postmaster General of the United States. The recommendations must include the recommended decision "on the merits of the complaint, including recommended remedial action." §1613.218.[7]

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[7]Appendix A to Part 1613, 29 C.F.R. 1613 provides that back pay must be awarded and specifies what constitutes back pay and how it must be computed and, most relevantly, provides for inquiry as to and set off for interim earnings in mitigation. It is applicable to all stages of the administrative proceeding. That is, it is the guideline which the agency must use in the settlement negotiations, it is the guideline which the administrative judge must use at the evidentiary hearings, it is the guideline which the agency must use in rendering a final decision in favor of a complainant, it is the guideline which the EEOC Office of Appeals and Review must use in issuing its Final Decision. Its purpose is to assure uniformity and consistency of remedial action in cases where

Certainly, if the Postal Service wanted the customary remedial action of full back pay to be modified, it was obligated to present its evidence on the mitigation issue during this evidentiary hearing.

In this case, the administrative judge found that the Postal Service had discriminated against Quinones on the basis of his handicap. The Postmaster General, however, rejected that finding and issued its own final decision denying Quinones's claim and notifying Quinones of his right to appeal to the EEOC. Quinones took the appeal and the EEOC then reviewed the entire complaint file, including the investigative file, documentation of the attempt to adjust the complaint, the transcript of the hearing,

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discrimination is found no matter who finds it and at what stage in the proceedings.

and all recommendations and decisions. The EEOC then issued its own Final Decision in favor of Quinones which ordered him reinstated and awarded him back pay from the date of discharge until the date of reinstatement.

Unlike the final decision in Snow v. Postal Service, Fed. Equal Opp. Rep. §881030 (Sept. 30, 1987), upon which the First Circuit in this case relied, there were no instructions to reduce the amount of back pay by amounts actually earned.

The First Circuit's reliance on the Snow case is inapplicable for other reasons as well. In the Snow case, the EEOC found that the Postal Service had moved for reconsideration, and the EEOC did amend its own Final Decision. In this case, the Postal Service never moved for reconsideration and the EEOC never disturbed its Final Decision. Moreover,

in Snow, the Postal Service did calculate an exact amount of back pay due which was less than the claimant had thought due. In this case, the Postal Service refused to make any calculation at all and insisted that it did not have to comply with the EEOC Final Decision at all. Finally, the Snow case was not an enforcement action. It was a continuation of the compliance stage of the administrative proceeding and was subject to the law of the case doctrine and not to the res judicata doctrine. In Arizona v. California, 460 U.S. 605 (1983), this Court distinguished the law of the case doctrine in which a tribunal may correct its own previous judgments on the grounds of public policy and manifest injustice from the doctrine of res judicata which requires finality without exception. In this case, unlike in Snow, there was no

compliance. In this case, unlike in Snow, the EEOC reviewed the Postal Service's argument of failure to mitigate and found it wanting. In this case, unlike in Snow, the EEOC did not retreat from, modify or in any other way disturb the finality of its decision that full backpay should be paid.

Once the EEOC issued its Final Decision, either party had the right, within 30 days, to request a reconsideration of all or part of that Final Decision. If the Final Decision had been unfavorable to Quinones, he could have brought a civil action in the United States District Court for a trial de novo on the merits of his complaint. See, 29 U.S.C. §794a; 42 U.S.C. §2000e-16(c) and (d); 42 U.S.C. §2000e-5(f) through 5(k); and 29 C.F.R. §1613.281. But, since the Final Decision was favorable to him, the

Postal Service was required either to notify the EEOC that the corrective action which was ordered was taken or that it seeks reconsideration or that it is taking temporary corrective action subject to determination of its motion for reconsideration. This was the fourth opportunity for the Postal Service to raise the affirmative defense of failure to mitigate.

If, as the First Circuit opinion held, the agency rather than the EEOC should compute the amount of back pay owed, and that this should be done during the compliance stage of the administrative proceedings, then it behooved the Postal Service to at this point move for reconsideration of the award of back pay in order to present its case on failure to mitigate. The Postal Service, however, did not take that simple step. It took

the option of notifying the EEOC of its compliance. Since no motion for reconsideration was made, the remedy ordered in the EEOC Final Decision became mandatory and binding on the Postal Service. At this point, the Postal Service was required to comply with the determination that full back pay was due by calculating the exact amount which would have been earned from the date of discharge to the date of reinstatement and paying said calculated amount to Quinones. Absent a motion for reconsideration, it was too late for the Postal Service to argue that no back pay at all was due or to refuse to make the calculation.

The Postal Service had sixty days in which to calculate the exact amount due and pay it to Quinones. This 60 day period is the compliance stage of the administrative proceedings. There is no

provision for an evidentiary hearing during the compliance stage. Thus, if as the First Circuit held, the federal agency is allowed to raise the failure to mitigate issue for the first time at this stage, there is a complete lack of due process afforded to the federal employee to rebut the affirmative defense. It becomes a unilateral decision made by the fox who has been left to guard the henhouse. It makes more sense to require the federal agency to raise the affirmative defense of failure to mitigate before the final decision awarding back pay is issued, than to allow it to be raised after the remedy is granted. At the very least, it is more in comport with basic fairness to require the federal agency to move for reconsideration rather than to condone its refusal to comply, after giving notice that it would comply,

and reward it for waiting until an outmanned federal employee brings an enforcement action in the District Courts.

It is plain that the issue of how much back pay should be awarded, that is for what periods of time back pay is due, is addressed at every step of the administrative procedure and is determined prior to the compliance stage of the proceedings. Only the calculation of the exact dollar amount that would have been earned during that time period is left to the federal agency during the compliance stage. Thus, the Postal Service had ample opportunity during the "adjustment of complaint" stage, during pre-hearing discovery, during the hearing itself, and during the review by the EEOC Office of Review and Appeals to raise and try to prove the affirmative defense of failure to mitigate. The Final Decision

containing the order to take the corrective action of awarding back pay from the date of termination to the date of reinstatement can be taken to mean either that the Postal Service raised the defense and failed to prove it or that it failed to raise the defense. In either event, the District Court was correct in holding that as the defense could have been raised in the administrative proceeding, it was estopped by the doctrine of res judicata from considering it in the action brought to enforce the binding and mandatory EEOC Final Decision awarding back pay from the date of unlawful discharge to the date of reinstatement. Cromwell v. County of Sac, supra.

Even if the correct time to raise the issue of failure to mitigate is during the compliance stage of the administrative

proceeding, as the First Circuit seemed to hold, surely it must be done through the route of a motion to reconsider. To allow the federal agency to simply refuse to comply, after it has signified that it would comply, and force the employee into bringing an enforcement action in the district court defeats the whole scheme of having the executive branch of the government be self-policing in the area of employee discrimination; it defeats the purpose of the mandatory and exclusive administrative remedy; and it certainly defeats the doctrine of res judicata. It places an unfair burden on the successful federal employee to allow a federal agency to remain idle during the entire administrative proceeding and wait until an enforcement action is brought to present its defenses and reasons for reversing the remedy awarded in the EEOC

Final Decision.

Even if the federal employer could wait until an enforcement action was brought in the District Court to prove the affirmative defense of failure to mitigate, which we deny, the federal employer in this case was given the opportunity to do so and threw it away. The First Circuit held that the entire administrative proceeding before the compliance stage was dedicated solely to the liability issue and that the amount of back pay, being an issue of damages, should be determined in the compliance stage. Even assuming this to be true, which we don't, we question two points. First, why should the agency which would be liable to pay the damages be the sole arbiter of the amount due? Surely, it is the EEOC which must decide whether back pay is to be awarded, and if so, for what

period of time. The liable federal agency is only responsible for doing the arithmetic necessary to comply with that EEOC decision. Second, if the issue of the amount of back pay to be awarded is one of damages rather than liability, as, of course it is, then so must the affirmative defense of failure to mitigate be an element of damages. The District Court entered the summary judgment on the issue of liability alone and scheduled a hearing on the issue of damages. The Postal Service was, thus, afforded the opportunity to present its proof that the amount to be awarded should be reduced by the amounts which were or could been earned in the interim. It chose to forego that opportunity and to stipulate to the amount to be awarded. It is inconsistent to hold, on the one hand, that the back pay and mitigation issue is one of damages

in the administrative proceeding and to hold, on the other hand, that providing an opportunity to try the issue in the district court was precluded by a summary judgment limited to the liability issue. Especially, when a hearing on damages was scheduled. The Justice Department should not have been heard in the First Circuit to seek relief from the Postal Service's trial strategy decision of choosing to stipulate rather than to try the exact amount of damages or backpay to be awarded. And Quinones should not have been forced all the way to this Court to get the remedy which has twice been determined due him.

It is well settled that the appellate court reviews judgments not opinions. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The doctrine of res judicata was

not the only grounds urged for summary judgment below. Depositions submitted in support of the motion for summary judgment showed that the Postal Service could not have carried its burden of proving that Quinones had failed to mitigate his damages. Moreover, the exhibits to the motion for summary judgment showed that Quinones had exercised reasonable diligence to obtain a comparable position. Further, Quinones points out that the Postal Service did not raise failure to mitigate as an affirmative defense in its answer to the complaint.

Plaintiff further emphasizes the fact that the court below gave the Postal Service the opportunity of a hearing to determine the amount of back pay to be awarded and that the Postal Service chose to stipulate the amount to be awarded instead of trying the issue.

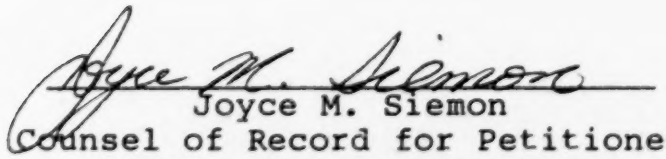
The District Court's judgment came to the First Circuit clothed in the presumption of correctness. Because there were several grounds for affirmance, the First Circuit erred in reversing the District Court opinion.

Lastly, the First Circuit also erred in reversing the order awarding attorney's fees to Quinones. Quinones prevailed in the District Court at least to the extent that he was successful in compelling the Postal Service to compute the gross amount of back pay that the EEOC had awarded to him and to the extent that everyone now agrees that he is due some backpay, whereas before the Postal Service claimed he was due none. Even if another trial on damages must be held, which it shouldn't, and even if the Postal Service could prove that the gross amount of backpay should be reduced for periods of failure to

mitigate, which it can't, Quinones would still be a prevailing party because he would end up with more than he had to start with.

This Court should grant the Writ of Certiorari to the First Circuit, vacate the First Circuit's opinion, affirm the summary judgment below and the order awarding attorney's fees to Quinones below, and grant Quinones's motion for attorney's fees before this Court.

Respectfully Submitted,



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CASE NUMBER:

THE SUPREME COURT OF THE UNITED STATES

TERM COMMENCING OCTOBER 1, 1990

SABAT QUINONES CANDELARIO,

PETITIONER

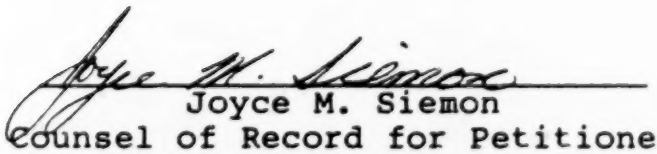
vs.

POSTMASTER GENERAL OF THE UNITED STATES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

APPENDIX

Respectfully Submitted,



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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1852

SABAT QUIÑONES CANDELARIO,

Plaintiff, Appellee,

v.

POSTMASTER GENERAL OF THE UNITED STATES,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Jaime Pieras, Jr., U.S. District Judge]

Before

Breyer and Torruella, Circuit Judges,

and Re,* Judge.

Wendy M. Keats, Appellate Staff, Civil Division, Department of Justice, with whom Stuart M. Gerson, Assistant Attorney General, Daniel F. Lopez-Romo, United States Attorney, and Robert S. Greenspan, Appellate Staff, Civil Division, Department of Justice, were on brief for appellant.

Joyce M. Siemon for appellee.

JUNE 26, 1990

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*The Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

RE, Chief Judge.

In this action, brought in the United States District Court for the District of Puerto Rico, plaintiff-appellee, Sabat Quiñones Candelario (Quiñones), seeks enforcement of a decision of the Office of Review and Appeals of the Equal Employment Opportunity Commission (EEOC) which granted him back pay. Defendant-appellant, the Postmaster General of the United States (Postmaster), appeals from an order of the court which granted Quiñones' motion for summary judgment.

Quiñones had filed an equal opportunity complaint with the Postal Service, alleging that the Postal Service had terminated his employment on the basis of a physical handicap, in violation of the Rehabilitation Act of 1973, as amended, codified at 29 U.S.C. §§ 701-796i

(1988). The Postal Service rejected Quiñones' complaint, and Quiñones appealed to the EEOC. The EEOC determined that the Postal Service had illegally discriminated against Quiñones, and ordered the Postal Service to reinstate Quiñones and grant him back pay. The Postal Service reinstated Quiñones, but denied him back pay.

Pursuant to 42 U.S.C. §§ 2000e-5(g) and 2000e-16(c), Quiñones then brought these compliance proceedings in the district court. The court granted Quiñones' motion for summary judgment, and, on the basis of res judicata, barred the Postal Service from raising Quiñones' failure to mitigate damages by failing to make a reasonable effort to seek alternative employment after his termination from the Postal Service.

On this appeal, the Postmaster contends that the district court erred in granting Quiñones' motion for summary judgment, and denying the Postmaster, on the basis of res judicata, the right to raise as a defense in the enforcement action, Quiñones' failure to mitigate damages.

The question presented is whether the district court erred in holding that the Postmaster must raise the plaintiff's failure to mitigate back pay losses, before the EEOC, or be precluded from raising it in a subsequent compliance proceeding brought in the district court.

Since we hold that the district court improperly applied the doctrine of administrative res judicata, we reverse and remand for proceedings consistent with this opinion.

BACKGROUND

Sabat Quiñones Candelario, a physically handicapped veteran, was hired by the United States Postal Service as a part time clerk, in August, 1979. On September 6, 1979, after a physical examination by a medical officer of the Postal Service conducted as a condition of his hiring, Quiñones was found medically unsuitable for employment, and his employment was immediately terminated.

Alleging that the Postal Service discriminated against him due to his disability, Quiñones filed an equal employment opportunity complaint with the Postal Service, pursuant to part 1613 of title 29 of the Code of Federal Regulations. See 29 C.F.R. § 1613.214 (1989). The Postal Service, in its agency decision, found that it had not

discriminated against Quiñones. Pursuant to section 231 of part 1613, Quiñones appealed the Postal Service decision to the EEOC. On April 8, 1985, the EEOC reversed the decision of the Postal Service, and ordered the Postal Service to "reinstate the appellant at the paygrade he would normally have reached if not terminated, and award him backpay for the period from his termination to his reinstatement."

On June 7, 1985, Quiñones was informed by the Postal Service that it would reinstate him pursuant to the EEOC decision, and would process his back pay claim in accordance with postal regulations as set forth in the Employee and Labor Relations Manual. As part of the back pay determination, Quiñones was required to submit proof of his interim

earnings, and of his efforts to obtain alternative employment. Accordingly, Quiñones submitted documentation to the Postal Service indicating that after his termination, apart from 100 hours of part-time work, he had no interim earnings. Quiñones also submitted evidence that he had searched for alternative employment.

Since the Postal Service determined that Quiñones had not submitted adequate proof that he had made reasonable efforts to obtain alternative employment, it denied him back pay. Subsequently, Quiñones filed this action in the United States District Court for the District of Puerto Rico, under 42 U.S.C. §§ 2000e-5(g) and 2000e-16(c), seeking enforcement of the EEOC order granting him back pay. Quiñones also sought costs and attorney fees.

Contending that, on the basis of administrative res judicata, the Postmaster's failure to assert the defense of lack of mitigation before the EEOC barred the Postmaster from raising the issue before the district court, Quiñones filed a motion for summary judgment. See Quiñones Candelario v. Postmaster General of the United States, 715 F. Supp. 414, 417 (D.P.R. 1989).

Noting that "[t]he principles of collateral estoppel have long been applicable when an administrative agency is acting in a judicial capacity[,]" the district court stated that "'[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" Id. (quoting Federated Dep't Stores, Inc.

v. Moitie, 452 U.S. 394, 398 (1981)). After stating that "there is no doubt that the EEOC serves in a judicial capacity, resolving issues of fact and providing the parties opportunity to litigate all the issues," id. at 417, the district court concluded that "[t]he interests of fairness, judicial economy, and enforcement of repose prohibit the defendant from collaterally attacking the EEOC award in the present proceeding." Id. at 418. Accordingly, the district court granted Quiñones' motion for summary judgment.

On this appeal, the Postmaster contends that the district court erred in denying the Postmaster the right to assert, as a defense in the enforcement action, Quiñones' failure to mitigate damages by seeking alternative employment

during the course of the agency dispute. The Postmaster submits that "backpay calculation is not normally the subject of EEOC administrative proceedings on the merits of federal sector employment discrimination complaints." Hence, the Postmaster maintains that the "the Postal Service is not precluded from raising failure to mitigate at the separate compliance stage where such issues normally are considered."

DISCUSSION

Under the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981).

In Cromwell v. County of Sac, 94 U.S. 351, 353 (1876), the Supreme Court stated that:

> a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, . . . when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

See also Restatement (Second) of Judgments §22(2)(b) and comment(b) (1982).

More pertinent to the present case is the statement of the Supreme Court that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to

enforce repose." United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966). See also University of Tennessee v. Elliott, 478 U.S. 788, 797-98 (1986); McCuin v. Secretary of Health and Human Servs., 817 F.2d 161, 172, (1st Cir. 1987). It would seem clear that, in the administrative proceeding in question, the EEOC acted in a judicial capacity. The EEOC reviewed the hearing conducted before the Postal Service, the affidavits and exhibits submitted to the Postal Service, and the report of Quiñones' medical examination. From this material, the EEOC adjudicated Quiñones' claim. Since the EEOC acted in a judicial capacity, any factual determinations that it made may be subject to the doctrine of res judicata.

Nevertheless, in the context of administrative proceedings, res judicata

is not automatically and rigidly applied in the face of contrary public policy. See, e.g., Gregory v. Bowen, 844 F.2d 664, 666 (9th Cir. 1988); International Harvester Co. v. Occupational Safety and Health Review Comm'n, 628 F.2d 982, 986 (7th Cir. 1980). For example, res judicata should not be applied when it would result in a "manifest injustice." See Marlene Indus. Corp. v. NLRB, 712 F.2d 1011, 1017 (6th Cir. 1983); Tipler v. E.I. duPont deNemours and Co., 443 F.2d 125, 128 (6th Cir. 1971). In this case, estopping the Postal Service from asserting Quiñones' failure to mitigate damages would be a "manifest injustice," and would violate the statutory mandate in compliance proceedings brought before the district court that "[i]nterim earnings or amounts earnable with reasonable

diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. §2000e-5(g) (1982).

The proceeding before the EEOC was concerned with a liability determination, and was not necessarily the appropriate forum for a precise determination of Quiñones' damages. The EEOC proceeding and the Postal Service determination that preceded it, were conducted pursuant to part 1613 of title 29 of the Code of Federal Regulations. Sections 231 to 240 of part 1613 permit a complainant to appeal an agency decision to the EEOC. Nowhere do these sections direct the EEOC to determine in that proceeding the specific amount of back pay due the complainant.

Section (4) of appendix A of part 1613, entitled "Backpay," provides that a complainant found to be discriminated against "must receive a sum of money equal to what would have been earned by the discriminatee in the employment lost through discrimination . . . less what was actually earned from other employment during the period, after normal expenses incurred in seeking and holding the interim employment have been deducted . . . " It is important to note, however, that part 1613 pertains to complaints processed before the alleged discriminating agency, as well as appeals to the EEOC, and section (4) does not specify which body must determine back pay in the first instance.

Furthermore, in practice, it appears that in typical proceedings the EEOC does

not compute back pay in the first instance. In Snow v. United States Postal Service, Fed. Equal Opp. Rep. ¶ 881030 (Sept. 30, 1987), the EEOC reversed a decision of the Postal Service that had rejected the complainant's allegations of discrimination. The EEOC ordered the Postal Service to reinstate the complainant, and to award him back pay, less any salary earned during the relevant time period. Following the EEOC decision, the Postal Service made a specific determination of the complainant's back pay, and reduced the award because of a failure to mitigate damages. On appeal, the EEOC affirmed the Postal Service's back pay determination. Hence, it is not unusual for the EEOC to remand to the Postal Service for a specific determination of the amount of back pay

due a complainant whom the EEOC has found to have been the victim of discrimination.

Moreover, res judicata should not be invoked when its application would not serve its underlying purposes or goals. See International Harvester, 628 F.2d at 986 (citing Bowen v. United States, 570 F.2d 1311, 1321 (7th Cir. 1978)). In this case, to preclude the Postal Service from raising before the district court Quiñones' failure to mitigate his damages would not foster administrative efficiency. To give preclusive effect here would required the EEOC, in future appeals from agency decisions, to make a specific determination of the amount of back pay due a complainant. A complainant's lost wages, as well as a complainant's opportunities for promotion, are matters that can best be considered

and determined by the agency which had employed the complainant. Hence, the interests of administrative efficiency favor the agency, rather than the EEOC in determining in the first instance the specific amount of back pay due to a complainant.

Quiñones also moved before this court for a grant of attorney's fees for the appeal. In support of the motion, Quiñones cites 42 U.S.C. §§ 2000e-5(k) and 2000e-16(d), which allows a district court to grant attorney's fees to plaintiffs who are "prevailing parties" in actions seeking enforcement of EEOC orders. Since we are reversing the decision of the district court, Quiñones is not a "prevailing party," and, hence, is not entitled to attorney's fees.

CONCLUSION

Since we hold that the doctrine of administrative res judicata, was erroneously applied, the decision of the district court is vacated, and the case is remanded for proceedings in accordance with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

SABAT QUIÑONES CANDELARIO, Plaintiff vs. POSTMASTER GENERAL OF THE UNITED STATES Defendant	*	CIVIL NO. 88-0172 (JP)

CORRECTED JUDGMENT

The judgment in this case, issued on May 31, 1989, contained a typographical error, i.e., the dates of the per-day judgment amount and the leave credits were stated to be May 20 rather than March 20. Pursuant to Fed. Rule Civ. Pro. 60(a), the Court hereby CORRECTS the judgment sua sponte. The judgment is as follows:

By virtue of the Opinion and Order entered on this date, it is hereby ORDERED

and ADJUDGED that the plaintiff recover from the defendant the amount of $138,760.68 in back pay, $105,275.45 in interest to March 20, 1989, and $68.37 per day from March 20, 1989, until the date the judgment is satisfied. It is further ORDERED and ADJUDGED that the defendant credit to the Plaintiff 728 hours in sick leave and 774 hours in annual leave, the leave awards to be usable retroactively by the plaintiff beginning on March 20, 1989.

SO ORDERED AND ADJUDGED

In San Juan, Puerto Rico, this 2nd day of June, 1989.

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JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

SABAT QUIÑONES CANDELARIO,	*	
	*	
Plaintiff	*	
	*	
	*	
vs.	*	CIVIL NO.
	*	88-0172 (JP)
	*	
POSTMASTER GENERAL OF THE UNITED STATES	*	
	*	
	*	
Defendant	*	
	*	

OPINION AND ORDER

Sabat Quiñones Candelario initiated this action to enforce a decision by the Equal Employment Opportunity Commission (EEOC) under the Rehabilitation Act, 29 U.S.C. §701, et. seq. The EEOC found that the United States Postal Service had illegally discriminated against Quiñones on the basis of physical handicap, and it ordered reinstatement with back pay. Quiñones was reinstated but has never been

awarded back pay. On February 6, 1989, the plaintiff filed a motion for summary judgment which was timely opposed on March 4, 1989. Because the opposition came just one week before trial was scheduled to begin, the Court's ruling on the summary judgment motion was made without findings of fact and conclusions of law on March 17, 1989. The Court now issues this Opinion and Order in support of summary judgment for the plaintiff.

I. Facts

On August 8, 1979, the plaintiff was hired as a postal clerk. As a new employee of the Postal Service, Quiñones was required satisfactorily to complete a 90-day probationary period which included a fitness-for-duty examination by a Postal

Service medical officer. The medical officer, Dr. Echevarrìa, examined Quiñones on September 6, 1979, and determined that he was medically unsuitable for the position of part-time flexible clerk. As a result, the Postal Service terminated Quiñones' employment, effective September 6, 1979.

On that day, Quiñones sought informal Equal Employment Opportunity (EEO) counseling with a postal EEO counselor. He considered the Postal Service to have discriminated against him because of his handicap. Quiñones did not succeed in resolving his claims informally, and he filed a formal EEO complaint on June 10, 1979. In accordance with administrative procedures, 29 CFR §1613.210, et. seq.,

the complaint was processed through the hearing state, at which the EEOC attorney examiner found that the Postal Service had discriminated against the plaintiff based upon his handicap.

In its final agency decision, however, the Postal Service rejected the attorney examiner's conclusions and found that Quiñones' termination was not discriminatory. Quiñones appealed that determination to the Office of Review and Appeals of the EEOC (ORA) which held that his termination was improperly based on his physical condition. On April 8, 1985, the ORA ordered the plaintiff to be reinstated with back pay.

On June 7, 1985, the Regional Director of Employee and Labor Relations

for the Postal Service's Northeast Region informed the plaintiff in writing that the Postal Service would reinstate him, pursuant to the decision of the EEOC, contingent on his present medical suitability and would process his back-pay claim in accordance with postal regulations set forth in the Employee and Labor Relations Manual (ELM). Plaintiff was reinstated on June 22, 1985. In accordance with these instructions, Mario V. Garcia, then Director for Employee/Labor Relations for the Caribbean District of the Postal Service, informed Quiñones by letter dated September 17, 1985, that before a back-pay determination could be made, Quiñones was required to

submit proof of his interim earnings and of his attempts to obtain employment.

In response to this instruction, Quiñones submitted an affidavit dated September 24, 1985, in which he states that his interim earnings consisted solely of 100 hours of part-time work as a student with the Veterans Administration. The parties agree that Quiñones had no actual earnings during the pendency of his case, except for part-time and odd jobs for minimal pay. On December 30, 1985, C. Lliteras, the District Manager/Postmaster for the Caribbean District, wrote a letter stating that additional information was required to process the back-pay claim. The letter also asked for the dates that Quiñones was employed by the Veterans

Administration, the dates that he attended the Inter American University as a student, and the usual hours that he attended classes.

On February 4, 1986, Quiñones submitted a list of nine places at which he had sought work before reinstatement, but the list did not indicate the dates on which he had applied for jobs. Quiñones also stated that from January, 1980, to December, 1982, studied at the Inter American University and took 12 credits each semester. By letter of March 5, 1986, the Postal Service denied back pay. It concluded that the evidence presented by the plaintiff failed to demonstrate the he had made reasonable efforts to obtain other employment.

In March, 1986, Quiñones filed three separate grievances under the grievance/arbitration procedure of the collective bargaining agreement between the American Postal Workers Union (APWU) and the Postal Service challenging the Postal Service's denial of his back pay claim. On May 13, 1986, Earl L. Benson, an ORA Compliance Officer, informed the General Manager of the Labor Relations Division of the Postal Service's Northeast Region that he believed that the Postal Service had sufficient information available to determine the amount of back pay due to Quiñones.

By letter of May 22, 1986, the Postal Service reaffirmed its previous denial of Quiñones' claim for back pay. It

explained that Quiñones failed to demonstrate in his February 4, 1986, submission that he had made reasonable attempts to obtain alternative employment and had failed to submit an adequate resumé of his efforts to secure other employment. On August 18, 1986, Quiñones submitted additional documents to the Postal Service and to the EEOC in an effort to demonstrate that he had made a reasonable effort to obtain employment during the period between his termination and his reinstatement to the Postal Service. On September 26, 1986, the Postal Service denied each of Quiñones' grievances at step three, the step before arbitration.

On January 30, 1987, the Postal Service informed the EEOC that it had found that the additional documentation submitted by Quiñones failed to meet the standards of the ELM requiring the plaintiff to furnish the Postal Service with a resumé of his efforts to secure other employment during the back-pay period. It pointed out that the documents submitted were suspect. In March, 1987, the Plaintiff's grievances were scheduled for arbitration; however, the plaintiff postponed this arbitration in lieu of his intent to initiate a civil action in this Court for enforcement.

The Court held two Initial Scheduling Conferences, on July 18, 1988, and November 3, 1988, to reach stipulations of

fact and to prepare a schedule for discovery. The plaintiff filed the present motion for summary judgment on February 6, 1989, and after receiving an extension of time, the defendant timely opposed on March 14, 1989.

The plaintiff argues that the failure-to-mitigate defense is available to the Postal Service only in actions on the merits, and the defendant is precluded from raising it in the present enforcement action under 42 U.S.C. § 2000e-5. The postal service argues that the EEOC never made a determination that Quiñones had or had not made sufficient attempts at mitigation. There was thus no ruling on the issue of mitigation, and the Postal

Service was justified in requiring mitigation before paying the award.

II. Summary Judgment

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. Rule Civ. Pro. 56(c). The Court views all facts in the light most favorable to the party opposing the motion (the Postal Service) and indulges in all inferences favorable to that party. Ismert and Associates v. New England Mut. Life Ins., 801 F.2d 536, 537 (1st Cir.1986), citing Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962). The defendant can defeat a motion for summary judgment by demonstrating the

existence of a genuine issue of material fact pertaining to those issues upon which it would bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Kauffman v. Puerto Rico Telephone Co., 841 F.2d 1169, 1171 (1st Cir.1988).

In this case, there are numerous controverted facts, but they are all immaterial to the dispositive issue in the case. That is, even if the Court considers all the defendant's allegations to be true,[2] the plaintiff must still

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[2]The plaintiff did not make any attempt to seek employment between the date of his termination and the date he enrolled as a full-time student at Inter American University; he quit the only job he obtained, a part-time position with the Veterans Administration; he did not apply for work at many of the places he claims to have contacted; he submitted fraudulent

prevail as a matter of law because the defendant is collaterally estopped from raising the mitigation-type defense in this action for enforcement.

III. Collateral Estoppel

In cases of employment discrimination, the proper remedy normally includes back pay. See Albemarle Paper Company v. Moody, 422 U.S. 405, 421 (1975). Title VII obligates the

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documents and affidavits to the Postal Service in an effort to show a reasonable attempt at finding other employment; there were clerical jobs with similar working conditions, status, and promotional opportunities available to the plaintiff; there were administrative jobs available to the plaintiff after he obtained his bachelor's degree; and the EEOC has not determined that the plaintiff satisfied his duty to mitigate his damages, nor has it issued an order to the Postal Service to pay Quiñones a specific amount of back pay.

plaintiff, however, to make reasonably diligent efforts to seek a substantially equivalent position. 42 U.S.C. §2000e-5(g). Any failure by the plaintiff to meet this obligation should result in a reduction in the back pay award.

The procedure for determining the amount of back pay is indicated in Wheeler v. Snyder Buick, Inc., 794 F.2d 1228, 1234 (7th Cir. 1986):

> Once damages have been established, it is the employer's burden "to prove, as an affirmative defense, that the employee failed to mitigate those damages." Hanna v. American Motors Corp., 724 F.2d 1300, 1307 (7th Cir.1984). To prevail, the employer must prove both that the employee was not reasonably diligent in seeking other employment, and that with the exercise of reasonable diligence there was a reasonable chance the employee might have found comparable employment.

> Id., (citing Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 159 (7th Cir. 1981)).

When the present case was before the EEOC, there was no inquiry into the reasonable-diligence issue, and there was no calculation of the back pay owed to Quiñones. The Postal Service argues that issue therefore cannot be foreclosed. The plaintiff argues that the principles of administrative res judicata bars further inquiry into the matter, regardless of the nature of the inquiry before the EEOC.

The principles of collateral estoppel have long been applicable when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate

opportunity to litigate. University of Tennessee v. Elliott, 478 U.S. 788 (1986); United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966). In this situation, the traditional preclusion doctrine applies: "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) citing Commissioner v. Sunnen, 333 U.S. 591 (1948); Cromwell v. County of Sac, 94 U.S. 351 (1877).

In this case, there is no doubt that the EEOC serves in a judicial capacity, resolving issues of fact and providing the parties opportunity to litigate all the

issues. See 29 CFR Part 1613 (July 1, 1988). The EEOC decision was plainly a judgment on the merits, and it constitutes a final judgment with which the Postal Service is obligated to comply. 29 CFR § 1613.237 (July 1, 1988). The Postal Service is therefore precluded from raising the reasonable-diligence issue if it could have raised it in the administrative proceeding.

Under 29 CFR §1613.271 and Appendix A (July 1, 1988), when the EEOC makes a finding of discrimination, the order of relief should include back pay,[3] computed

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[3]"Each identified victim of discrimination is entitled to be made whole for any loss of earnings the discriminatee may have suffered by reason of the discrimination. Each individual discriminatee must receive a sum of money equal to what would have been earned by

according to 5 CFR §550.805. Both Appendix A and the OPM regulations (5 CFR) require deductions for amounts actually earned by the victim of discrimination.[4] The exact construction of the back-pay

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the discriminatee in the employment lost through discrimination ('Gross Backpay' less what was actually earned from other employment during the period after normal expenses incurred in seeking and holding the interim employment have been deducted ('Net Interim Earnings')."

29 CFR Part 1613, Appendix A (July 1, 1988) (emphasis added).

[4]The fact that these regulations do not provide for reasonable-diligence deductions, but only for actual-earnings deductions, does not alter the fact that back pay is properly awarded by the EEOC and is an issue that should be raised in that forum. The apparent difference in the standards might give the defendant motivation for reserving the reasonable-diligence question, but it does not provide the opportunity to raise the question in a subsequent enforcement proceeding.

award is therefore a proper subject of the EEOC proceedings.

The defendant argues that the EEOC sometimes does make precise calculations of back pay and that collateral estoppel should apply only in those instances. The reasonable-diligence issue is in the nature of an affirmative defense, however, see Wheeler, 794 F.2d at 1234 (above), and the defendant is obligated to raise it in the primary proceeding if it wishes to rely on it later.

The doctrine of administrative res judicata is not applicable where legislative policy favors an independent determination of the issue in another tribunal. Rosenfeld v. Department of Army, 769 F.2d 237, 240 (4th Cir.1985),

citing Restatement (Second) of Judgments § 83(4)b (1982). In this case, however, the Court can discern no legislative policy that would favor separate, collateral review of the reasonable-diligence issue. Section 2000e-5(g) arguably embodies a more rigorous mitigation standard than do the OPM and EEOC regulations, and the Postal Service appears to have an interest in applying the more stringent standards of the statute and its own Employee and Labor Relations Manual. The Postal Service does not, however, offer any reason why it should be allowed to sit idly by in the EEOC process, receive an unfavorable (i.e., unmitigated) decision on back-pay, and then hold the purse

strings on an outmanned employee while it awaits an civil action for enforcement.

The EEOC order, issued after an adjudicative process with full opportunity for the Postal Service to ask for deductions in the back-pay award, therefore constitutes a final decision on the merits with respect to back-pay. The interests of fairness, judicial economy, and enforcement of repose prohibit the defendant from collaterally attacking the EEOC award in the present proceeding. See University of Tennessee v. Elliott, 478 U.S. 788 (1986); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-30 (1971). For this reason, the plaintiff's motion for Summary Judgment is GRANTED,

and the only remaining task for this Court is to calculate the award.

IV. Back Pay

On March 20, 1989, the parties appeared for a hearing and made the following representations regarding the Postal Service's obligations toward the plaintiff:

1. The plaintiff was owed 728 hours in sick leave.

2. The plaintiff was owed 774 hours in annual leave. Because Postal Service regulations limit annual-leave accrual to 240 hours, the remaining 534 hours would be either compensated in cash at the base-pay rate or they would be accredited to the annual-leave account anyway.

3. There is no dispute as to seniority.

4. The principal amount of back pay due is $138,760.68.

5. The interest due was between $100,000 and $130,000, but had not been agreed upon by the parties. The parties agreed that the method of calculation was to compound the interest annually, computed from the pay period due, at the federal judgment rate.

The plaintiff subsequently submitted calculations totaling $118,078.39 in interest through March 20, 1989. The defendant submitted a correction stated that the plaintiff had used an inflated principal amount ($140,084.90) and had used a calendar year basis for compounding

interest. The defendant considered these mistakes to amount to $12,804.34, leaving $105,275.45.

The plaintiff has not opposed this figure, and the Court adopts it and shall enter judgment on this amount. The interest subsequent to March 20, 1989, shall be paid at $68.37 per day.

Annual and sick leave shall be effective immediately and applicable retroactively to March 20, 1989. Judgment shall be entered accordingly.

IT IS SO ORDERED

In San Juan, Puerto Rico, this 31 day of May, 1989.

JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

SABAT QUIÑONES CANDELARIO, Plaintiff vs. POSTMASTER GENERAL OF THE UNITED STATES Defendant	*	CIVIL NO. 88-0172 (JP)

ORDER

The plaintiff's three attorneys have submitted requests for attorney's fees and costs, as follows:

- Attorney Jiménez's costs: $1,993.20
- Attorney Jiménez's fees, administrative: 308 hours
- Attorney Jiménez's fees, court: 82 hours (16 in court)
- Attorney Burton's costs: $12,405.73

- Attorney Burton's fees: 240.3 hours, $84,105.00
- Attorney Siemon's fees: 172.3 hours, $60,305.00

The defendant has filed an opposition to these requests, asking for numerous reductions in the award.

The parties agree that the lodestar approach should be used to calculate the fees. See Hensley v. Eckerhart, 461 U.S. 424 (1983). The defendant contests the $175.00 hourly figure for Attorneys Siemon and Burton, the indiscriminate application of the hourly rate to routine tasks, the duplication of effort among the three attorneys for the plaintiff, the amount of time spent on numerous tasks, the charges for travel time and costs, the claimed

multiplier for contingency risk, and the record keeping of Attorney Jiménez.

The hourly rate must be determined by using the prevailing market rates in the community for similar services by lawyers of similar skills, experience, and reputation. Wildman v. Lerner Stores, 771 F.2d 605 (1st Cir.1985). Both Attorneys Siemon and Burton were hired specifically for this enforcement action, with Attorney Jiménez representing Quiñones throughout.

In recent civil rights cases in this district, attorneys with the experience and skill have been paid from $150.00 to $200.00 per hour of in-court time, with reductions for time spent in other activities. A workable and equitable system appears in Morales Feliciano v.

Hernàndez Colòn, 697 F.Supp. 51 (D. Puerto Rico 1988), dividing various tasks into categories for compensation.[1] The Court

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[1]The categories are:

> 1) Low: includes notifications and visits to the penal institutions; prisoners' interviews; conferences with co-counsel or adversaries (unless otherwise categorized); drafting of letters; drafting and reading of intra-counsel memoranda; proofreading and copyreading; notification of and preparation for depositions; review of documents; telephone conversations; and travel time.

Hours falling under the low category will be compensated at 60 percent of the applicable . . . rate.

> 2) Medium: includes general research, taking of and attendance [at] depositions; preparations for court hearings or conferences (if so specified

shall apply this system to the base rate of $175.00 per hour for both Attorneys Siemon and Burton, a rate which fairly reflects the cost of retaining a local

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on the time records); preparation of subpoenas, class notices, prisoners' questionnaires, and affidavits; preparation for prisoners rights' seminar; and preparation of fee applications.

Hours falling under the medium category will be compensated at 80 percent of the applicable . . . rate.

3) High: includes court appearances and in chambers conferences; jail visits with the judge; preparation and drafting/dictation of motions and briefs; negotiations toward stipulation with court monitors and defendants.

Hours falling under the high category will be compensated at the full applicable . . . rate.

Morales Feliciano v. Hernandez Colòn, 697 F. Supp. 51, 59 (D. Puerto Rico 1988).

attorney with the necessary expertise in this general field.

The calculations for Attorney Siemon's work are as follows:

Activity	High	Medium	Low
7/26 Review File			2.0
8/3 Fact statements		6.3	
8/4 Legal research		8.3	
8/5 Legal research		7.6	
8/8 Draft pro hac motion		1.2	
8/8 Draft S/J memo	5.7		
8/9 Draft S/J memo	9.4		
8/10 Draft S/J memo	13.6		
8/11 Draft extension motion		0.5	
8/17 Teleconference			0.4
9/6 Teleconference			0.2
9/9 Review Def't. motion			0.2
9/16 Review Def't. memo			1.2
11/2 Pretrial prep.**		1.3	
11/2 Travel to conference**			3.0
11/3 Court conference*	3.0		
11/3 Conference w. client*			5.0
11/3 Travel from conference			3.0
11/4 Review court order			0.3
11/8 Legal research		6.5	
11/9 Legal research		5.4	
11/11 Legal research		7.3	
11/12 Draft memo	8.2		
11/13 Draft memo**	2.3		
11/13 Deliver memo**			3.0
11/13 Teleconference**			3.0

11/14 Teleconference			0.2
11/17 Motion to strike		0.5	
1/27 Motion for extension			0.4
1/28 Draft S/J motion	2.0		
1/29 Draft S/J motion	2.0		
1/31 Draft S/J motion	1.5		
2/3 Draft S/J**	4.0		
2/3 Teleconference**			1.0
2/3 Draft other docs.**		4.0	
2/4 Proof and revise		6.0	
2/5 Travel to P.R.			3.0
2/6 Conference w. client*/**			11.0
2/6 Travel to Miami**			3.0
2/6 Court conference*/**	3.0		
3/17 Conference			0.3
3/19 Travel to P.R.			6.0
3/20 Court appearance*/**	4.0		
3/20 Travel to Miami**			3.0
3/20 Conference w. client */**			10.0

	High	Medium	Low
Totals	58.70	54.90	59.20
Less 1/2 duplicate hours	5.0		13.0
Total hours	53.7	54.9	46.2

Items marked with a single asterisk (*) are tasks unnecessarily duplicated with Attorney Burton, and the hours will therefore be reduced by half. Items marked with a double asterisk (**) are not

properly itemized in Attorney Siemon's records, and the Court has reasonably divided the hours according to its records and other indications.

Attorney Siemon's total lodestar figure is therefore calculated as follows:

53.7 x $175	=	$ 9,397.50
54.9 x $140	=	$ 7,686.00
46.2 x $105	=	$ 4,851.00
Total		$21,934.50

Both Attorneys Siemon and Burton request a double multiplier for taking the case on a contingency basis. An enhancement is available in the exceptional case in which the level of risk is unusual. See Wildman, 771 F.2d at, 613-614. Because this was an enforcement case, the attorneys appear to have engaged in very little risk. The decision on the merits had already been

made, and in the worst case, the plaintiff would have recovered a back-pay award reduced for the time he spent in school and thereafter. The court considers it unlikely that attorneys of the competence of Mr. Burton and Ms. Siemon could have made this case one in which the plaintiff did not substantially prevail. Because of the low risk, then, the court declines to adjust the award of the attorneys due to the risk of contingency.

Fees shall therefore be awarded to Attorney Siemon in the amount of $21,934.50.

Attorney Burton's award is calculated as follows:

Activity	High	Medium	Low
11/8/86 Client conference			15.0
2/9/87 Client teleconference			0.8
2/12 Teleconferences			4.1
2/17 Teleconferences, review			8.2
2/27 Conference**			0.5
2/27 Draft complaint**	0.5		
2/27 Teleconferences			0.8
3/1 Research**		5.0	
3/1 Draft complaint**	5.0		
3/12 Conference			2.4
3/16 Research**			1.0
3/16 Draft suit**	0.8		
4/14 Conferences			1.6
8/11 Conferences, review			1.5
9/18 Draft motion/dismiss	4.0		
9/18 Review material		2.0	
11/20 Teleconference			0.8
4/1/88 Teleconference			0.6
5/9/88 Draft mot. to appear		1.0	
6/20 Prepare discovery		2.1	
6/27 Prepare discovery		1.8	
7/17 Travel to P.R.**			3.0
7/17 Client conference**			1.0
7/18 Co-counsel conference**			4.0
7/18 Court conference**	3.0		
7/18 Return travel**			3.0
7/19 Teleconference			1.0
9/15 Teleconferences			0.6
10/10 Teleconference			2.6
11/2 Travel to P.R.**			3.0
11/2 Court conference**/*	3.0		
11/2 Return travel**			3.0
11/2 Additional hours**/***			11.0
11/7 Teleconference			1.0

11/8 Teleconference			1.0
11/9 Teleconference			1.0
11/14 Review, preparation		2.1	
11/21 Review, preparation		4.2	
11/28 Teleconference			0.5
11/28 Teleconference			0.7
12/1 Teleconference			2.5
12/9 Depositions		12.0	
12/9 Depositions		10.0	
12/19 Teleconference			0.4
12/29 Teleconference			0.6
12/29 Review deposition			2.0
1/2/89 Review deposition			3.1
1/3 Preparation		3.0	
1/4 Deposition		14.0	
1/5 Teleconference			0.5
1/6 Prepare interrogatories		1.4	
1/12 Travel to P.R.			4.0
1/13 Attend deposition**		7.0	
1/13 Travel**			3.0
1/14 Extra day for dep'n**			12.0
1/16 Prepare interrogatories		3.8	
1/17 Teleconference			0.6
2/5 Travel to P.R.**			3.0
2/6 Court conference**/*	3.0		
2/6 Travel to Miami**			3.0
2/6 Additional hours***			14.0
2/15 Teleconference			0.4
2/23 Teleconference			0.3
3/9 Teleconference**			0.5
3/13 Research, review		1.1	
3/13 Co-counsel conference**			0.5
3/13 Trial preparation**		0.8	
3/16 Trial preparation		4.8	
3/18 Teleconference			0.7
3/19 Travel to P.R.			7.0

3/20 Court hearing**/*		4.0	
3/20 Travel to Miami**			6.0
	High	Medium	Low
Totals	23.30	79.20	137.80
Less disallowed time			25.0
Less 1/2 duplicate hours	3.5		1. 5
Total hours	19.80	79.20	111.3

Items marked with a single asterisk (*) are tasks duplicated with Attorney Siemon, and the hours will therefor be reduced by half. Items marked with a double asterisk (**) are not properly itemized in Attorney Burton's records, and the Court has reasonably divided the hours according to its records and other indications. Items marked with a triple asterisk (***) are not sufficiently explained by the records, and because they appear to be excessive, they will not be allowed.

Attorney Burton's total lodestar figure is therefore calculated as follows:

19.8	x $175 =	$ 3,465.00
79.2	x $140 =	$11,088.00
111.3	x $105 =	$11,686.50
Total		$26,239.50

As stated above, a multiplier is inappropriate in this case. Fees shall therefore be awarded to Attorney Burton in the amount of $26,239.50

Attorney Jiménez has failed to submit adequate contemporaneous records to enable the court properly to award fees. In addition the attorney states but does document an entitlement for 308 hours' compensation for work on the administrative level. Rather than deny the fees outright, the Court GRANTS Mr. Jiménez until June 30, 1989, to further document his entitlement to fees, either

by contemporaneous records or more detailed statements supported by affidavit. The attorney shall also file any record of the EEOC's consideration of his fee petition.

The Clerk of the Court is ORDERED to consider the plaintiff's petition for costs.

IT IS SO ORDERED

In San Juan, Puerto Rico, this 31 day of May, 1989.

JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

SABAT QUIÑONES CANDELARIO,	*	
	*	
Plaintiff	*	
	*	
	*	
vs.	*	CIVIL NO.
	*	88-0172 (JP)
	*	
	*	
UNITED STATES POSTAL SERVICE, ANTHONY M. FRANK, Postmaster General of the United States	*	
	*	
	*	
Defendants	*	
	*	

O R D E R

The plaintiff's motion for summary judgment is GRANTED. A full opinion and order shall follow shortly. A hearing shall be held on March 20, 1989, at 9:30 a.m. (the original trial date and time) to determine the amount of back pay, interest, and seniority owed to the plaintiff. The parties shall be fully

prepared to dispose of these issues on that date.

The Clerk shall telephone notify the parties of this Order.

IT IS SO ORDERED

In San Juan, Puerto Rico, this 16 day of March, 1989.

JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Washington, D.C. 20507

SABAT QUIÑONES CANDELARIO, Appellant,	*	
vs.	*	Appeal No. 01832273
UNITED STATES POSTAL SERVICE, Appellee.	*	Agency No. 1-1-0361-0

DECISION

INTRODUCTION

On July 9, 1983, Sabat Quiñones Candelario (hereinafter referred to as the appellant) filed this appeal to the Equal Employment Opportunity Commission of the final decision, issued June 17, 1983, of the United States Postal Service (hereinafter referred to as the agency) on his equal employment opportunity

complaint. The appellant had alleged discrimination on the basis of his physical handicap (back and knee problems) in violation of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §701 et seq. This appeal is accepted in accordance with the provisions of EEO Order No. 960, as amended.

BACKGROUND

The appellant is a veteran who has been assigned a 30% disability rating by the Veterans Administration. Approximately 30 days into his probationary period with the agency the appellant submitted to a physical examination by an agency medical officer, who found him medically unsuitable for employment. The appellant was terminated

that day. Feeling that he was the victim of discrimination because of his physical handicap he sought EEO counseling and filed a formal complaint which eventually was the subject of a hearing. The evidence in the file, including that contained in the affidavits and exhibits accompanying the investigations's report (I.R. Aff. ____; I/R. Ex.____) and the hearing transcript (H.T.___) is summarized below.

The appellant's 30% medical disability rating is the sum of his 20% rating for a back condition, specifically "myofacial lumbar strain; myositis cervico-dorso-lumbar paravertebral muscle" and a 10% rating for "post medical meniscectomy residuals mild arterial

lateral capsulo ligaments, left knee." The agency's hiring worksheets reflects that the appellant's rating score was 92 out of a possible 100; this score included a 10 point veteran's preference (I.R. Ex. 2). The appellant received a career appointment as a distribution clerk subject to a 90 day probationary period (I.R. Ex. 3). Continued employment was subject to recommendation of an agency medical officer. Id.

The appellant worked as a distribution clerk for nearly one month. During this period he never went to a sick call, nor was he ever absent for sickness or any other reason (H.T. 19). He never complained of pain or injuries. Id. The appellant plays in a softball league and

had not sought medical attention for physical pain in the two years between his termination and the hearing on his complaint (H.T. 20-21). When asked how he felt physically he responded: "Perfectly well. I can function and I would like to state that I was functioning at my job perfectly well, and I can do it again, if given a chance (H.T. 21).

When specifically asked by the hearing officer what his duties as a distribution clerk entailed the appellant responded that he worked "eight hours, maybe less" in an average day (H.T. 26-27), and that during this time he would alternate between standing and sitting (H.T. 27). When he had to lift mail trays the heaviest weighed no more than 25 or 30

pounds. Id. The walking required by the job was never more than five or ten yards, and normally less. Id. The work he did never entailed bending, stooping or lifting articles above his head (H.T. 28). While he worked for the agency he never experienced any pain or took any medication. Id.

The agency had in effect at the time the appellant worked for it a regulation requiring that all cases of back difficulty be referred for an advisory medical opinion. I.R. Ex. 6. The functional requirements for a distribution clerk include heavy lifting (up to 70 pounds), moderate carrying (15-44 pounds), straight pulling, pushing, walking, standing and repeated bending. I.R. Ex.

7. Nearly one month after the appellant had been on the job he was called in for a physical examination by an agency medical officer. A subsequent report of that examination concluded as follows:

> A review of [the appellant's] medical records and the medical examination revealed active back problem. This condition is not compatible with the strenuous activities including heavy lifting, pushing, pulling, pulling [sic] repetitive stretching, reaching, standing and walking up to ten (10) hours which are requirements of this position, we feel postal employment would place personal health and safety in jeopardy.

I.R. Ex. 8.

It developed at the hearing that the medical officer reached that conclusion as the result of a review of the appellant's Veterans Administration records and a

physical examination (H.T. 33). Examination of the appellant's spinal area revealed "pain and tenderness to percussion (H.T. 35), although in response to a later question the medical officer stated that the appellant "didn't describe [pain], he just described tenderness after percussion" (H.T. 36). The appellant's VA records did not include X-Rays; the medical officer ordered none (H.T. 39). The medical officer related that the appellant told him he was taking four kinds of medication (H.T. 41). The medical officer never asked the appellant if he had suffered recent trauma to his back (H.T. 51).

In order to determine whether the appellant had any limitation on his

ability to bend the medical officer had him squat, and flex and extend his back; this test indicated no limitation in the appellant's ability to bend (H.T. 53). The medical officer performed no diagnostic tests that would indicate whether the appellant had any limitation on his ability to lift a heavy item or to push or pull objects. Id. Nor did his examination indicate any limitation on the appellant's ability to stand, walk or sit (H.T. 53-54).

The medical officer reached his conclusion that the appellant's condition was not compatible with strenuous activity "[s]econdary to the pathology that the patient had that is that moment an acute inflammation [sic] of the spinal muscles.

It would be a jeopardy to his health, because he has to use in a strenuous activity those muscles" (H.T. 54).

The appellant was terminated the same day as his physical examination. I.R. Ex. 4. The agency's District Director of Employee/Labor Relations stated that "[a] reasonable accommodation could not be made for [the appellant] because his present condition, as diagnosed by [the medical officer] would prevent him from performing the required duties of the position in an effective manner and could be harmful to his health." I.R. Aff. C. The complaints examiner recommended a finding of discrimination based, in part, on his determination that the testimony of the medical officer was "at best disingenuous

and on occasion lacking in credibility." The agency, however, found no discrimination, based on the medical officer's determination that the appellant was medically unsuited for the position. It is from this decision that the appellant appeals.

ANALYSIS AND FINDINGS

The issue on appeal is whether the record supports a finding of no discrimination. We begin with the premise that section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791, imposes a duty upon federal agencies to structure their procedures and programs so as to ensure that handicapped individuals are afforded equal opportunity in both job assignment and promotion. Ryan v. Federal Deposit

Insurance Corp., 565 F.2d 762, 763 (D.C. Cir. 1977). It is the general policy underlying our regulations on handicap discrimination that the "Federal Government shall become a model employer of handicapped individuals." 29 C.F.R. §1613.703. A specific part of that duty is to make reasonable accommodation to the known physical limitations of a qualified handicapped employee. 29 C.F.R. §1613.704(a).

The appellant is indisputably a qualified handicapped person within the contemplation of our regulations. Although there is a dispute between the appellant and the agency as to the effect his condition has on his major life activities, it is clear that the agency

regards him as having a physical impairment affecting his musculoskeletal system which substantially limits his ability to work. He is thus a "handicapped person" as that term is defined in our regulations. 29 C.F.R. §§1613.702(a)-(c),(e). It is the appellant's uncontroverted testimony that he was able, even without accommodation, to perform the essential functions of the position in question without endangering himself and others. He is thus a "qualified handicapped person" as defined in 29 C.F.R. §1613.703(f).

The status of the appellant as a qualified handicapped individual thus established, the burden of proving inability to accommodate his handicap is

on the agency. Prewitt v. United States Postal Service, 662 F.2d 292, 308 (5th Cir. 1981). We find that the agency has articulated no credible evidence that accommodation of the appellant is not reasonably possible. The medical officer's examination revealed only a tender back with a history of soft-tissue problems. When specifically asked to relate this findings to the functional requirements of the appellant's job he could not do so. What the medical officer did was to fall into the trap the Prewitt court warned about in a somewhat different context: grouping handicapped persons into broad subclasses. 662 F.2d at 307. The real focus must be on the individual job seeker, and not solely on the impairment

or the perceived impairment. Black v. Marshall, 497 F. Supp. 1088, 1100 (D.Ha. 1980). There is no evidence of record that the appellant is individually unsuitable for the work of a distribution clerk; in fact, the only evidence relating to his ability to perform is directly to the effect that he can perform that work with no need for accommodation.

Since the agency's determination that reasonable accommodation is impossible is based solely on the medical officers' determinations, it too is without factual basis. The agency thus erred in finding no discrimination. As there is undisputed evidence in the record that the appellant was capable of performing his job without accommodation we shall not speculate as to

what form of accommodation might be appropriate should a deficiency later become apparent in his performance.

CONCLUSION

Based on a review of the record, and for the reasons stated above, the final decision of the agency is reversed and a finding of discrimination on the basis of physical handicap entered. The agency will reinstate the appellant at the paygrade he would normally have reached if not terminated, and award him backpay for the period from his termination to his reinstatement. Should it become apparent after the appellant's reinstatement that he is unable to perform the essential functions of his job without accommodation, the agency shall, at that

time attempt to fashion a reasonable accommodations which addresses the specific deficiency.

IMPLEMENTATION OF THE COMMISSION DECISION

Under EEOC regulations, compliance with the Commission's corrective action is mandatory. The agency must report to the Commission, within thirty (30) calendar days of receipt of the decision, that corrective action has been taken. The agency's report should be forwarded to the compliance Office, Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E. Street, N.W., Washington, D.C. 20507. A copy of the report should be sent to the appellant.

NOTICE OF RIGHT TO FILE A CIVIL ACTION

Pursuant to 29 C.F.R. §1613.282, the appellant is hereby notified that this decision is final and that he has the right to file a civil action on the Rehabilitation Act claim in the appropriate U.S. District Court within thirty (30) days of the date of receipt of this decision.

APPOINTMENT OF COUNSEL

If appellant elects to file a civil action and does not have or is unable to obtain the services of an attorney to act as his counsel, appellant may request that the Court appoint an attorney for purposes of the civil action. The Court in its discretion may appoint an attorney to represent appellant and authorize

commencement of the action without the payment of fees, costs, or security. A request for the appointment of counsel must be field with the Court within the time limit for filing a civil action.

NOTICE OF RIGHT TO REQUEST REOPENING

The appellant and the agency are hereby notified that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

1. New and material evidence is available that was not really available when the previous decision was issued;

2. the previous decision involves an erroneous interpretation of law or

regulations or misapplication of established policy; or

3. The previous decision is of precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

This notice is in accord with 29 C.F.R. §1613.235. As provided therein, agency requests to reopen must be filed within 30 days from the date of receipt of decision.

FOR THE COMMISSION:

April 8, 1985
DATE

Cynthia Matthews
Executive Officer

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Review and Appeals
5203 Leesburg Pike, Suite 900
Falls Church, Virginia 22041

January 8, 1987

Mr. Stuart A. Abramson
Senior Assistant Regional
Labor Counsel
Office of Labor Law
United States Postal Service
1633 Broadway-20th Floor
New York, NY 20098-0170

Re: Candelario, Sabat Quiñones v. USPS
ORA Docket No. 01.83.2273
Agency Case No. 1-1-0361-1

Dear Mr. Abramson:

This refers to implementation of the Commission's decision cited above.

On September 23, 1986, you were requested to advise this Office within 30 days of the action taken to process appellant's back pay claim. On November 14, 1986, appellant's attorney contacted this Office in an attempt to ascertain if any action had been taken in this regard. (See enclosure.) As of the above date, no information has been received in connection with our September 23 letter.

We believe that the agency has had more than enough time to process appellant's back pay claim and to notify this Office accordingly. Unless we receive an implementation report within 20 days of

receipt of this letter, a report of noncompliance will be forwarded to the Chairman's Office for action, as appropriate.

Further, it is the Commission's position that its order in this case is binding and enforceable by the appellant/plaintiff under the Administrative Procedures Act. Houseton v. Nimmo, 670 F.2d 1375 (9th Cir. 1982); Moore v. Devine, 780 F.2d 1559 (11th Cir. 1986).

Sincerely,

Earl L. Benson
Compliance Officer
Compliance and Control Division
Office of Review and Appeals

Enclosure

cc: Sabat Quiñones Candelario
I 2635 Paseo Anon
Levittown, Puerto Rico 00632

Julio Jimenez Gonzalez, Esq.
Avenida Jesus T. Piniero 1332
Caparra Terrace, Puerto Rico 00921

General Manager, EEO Appeals Division
United States Postal Service
475 L'Enfant Plaza N.W., Room 9531
Washington, D.C. 20260-4245

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1852

SABAT QUIÑONES CANDELARIO.
Plaintiff, Appellee,

v.

POSTMASTER GENERAL OF THE UNITED STATES,
Defendant, Appellant.

JUDGMENT

Entered: June 26, 1990

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court is vacated and the cause is remanded to the district court for further proceedings

in accordance with the opinion filed this date.

No costs.

By the Court:

_____

Clerk.

[cc: Ms. Keats and Ms. Siemon]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1852

SABAT QUIÑONES CANDELARIO,
Plaintiff, Appellee,

v.

POSTMASTER GENERAL OF THE UNITED STATES,
Defendant, Appellant.

Before

Breyer, Chief Judge,
Campbell, Torruella, Selya, Cyr, *,
Circuit Judges,
and Re, **, Judge.

ORDER OF COURT

Entered: September 4, 1990

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered

by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Clerk.

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*Circuit Judge David H. Souter did not participate

**The Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

[cc: Ms. Keats and Ms. Siemon]

29 U.S.C. § 791.
Employment of handicapped individuals

(a) Interagency Committee on Handicapped Employees' establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions.

There is established within the Federal Government an Interagency Committee on Handicapped Employees (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Office of Personnel Management, the Administrator of Veteran's Affairs, and the Secretaries of Labor and Education and Health and Human Services. The Secretary of Education and the Chairman of the

Office of Personnel Management shall serve as co-chairmen of the Committee. The resources of the President's Committees on Employment of the Handicapped and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of handicapped individuals, and to review, on a periodic basis, in cooperation with the Office of Personnel Management, the adequacy of hiring, placement, and advancement practices with respect to handicapped individuals, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Office of Personnel Management to assist

the Office to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Office of Personnel Management such recommendations for legislative and administrative changes as it deems necessary or desirable. The Office of Personnel Management shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) **Federal agencies; affirmative action program plans**

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch, shall, within one hundred and eighty days after September 26, 1973, submit to the

Office of Personnel Management and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Office, if the Office determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

(c) State agencies; rehabilitated individuals, employment

The Office of Personnel Management, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for handicapped individuals, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

(d) Report to Congressional committees

The Office of Personnel Management, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of handicapped individuals by each department, agency, and instrumentality and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Office of Personnel Management under subsection (1) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include

an evaluation by the Committee of the effectiveness of the activities of the Office of Personnel Management under subsections (b) and (c) of this section.

(e) Federal work experience without pay; non-Federal status

An individual who, as part of his individualized written rehabilitation program under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

(f) Federal agency cooperation; special consideration for positions on President's Committee on Employment of Handicapped

(1) The Secretary of Labor and the Secretary of Education are authorized and directed to cooperate with the President's Committee on Employment of the Handicapped in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of the Handicapped, special consideration shall be given to qualified handicapped individuals.

(Pub.L 93-112, Title V, § 501, Sept. 26, 1973, 87 Stat. 390; Pub. L. 98-221, Title I, § 104(b)(3), Feb. 22, 1984, 98 Stat. 18.)

29 U.S.C. § 794a.

Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the

Civil Rights Act of 1964 (42 U.S.C. 20003-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Acts of 1964 [42 U.S.C.A. § 2000d et seq.] shall be available to any person aggrieved

by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

(Pub.L 93-112, Title V, § 505, as added Pub. L. 95-602, Title I, § 120, Nov. 6, 1978, 92 Stat. 2982.)

42 U.S.C. § 2000e-16.

Employment by Federal Government

Discriminatory practices prohibited; employees or applicants for employment subject to coverage

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed

outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United Sates Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Enforcement powers of Commission; issuance of rules, regulations, etc.; annual review and approval of national and regional equal

employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall -

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to -

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and

operating officials of each such department, agency, or unit responsible for carrying cut the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

(c) Within thirty days, of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the

Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as

provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 2000e-(f) through (k) of this title applicable to civil actions

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution and statutes or of its responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(Pub.L 88-352, Title VII, § 717, as added Pub.L 92-261, § 11, Mar. 24, 1972, 86 Stat. 111, and amended 1978 Reorg.Plan No. 1, § 3, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub.L. 96-191, § 8(g), Feb. 15, 1980, 94 Stat. 34.

42 U.S.C. § 2000e-5

Civil action by Commission, Attorney General or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a

government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of

this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the

respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its

discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the

Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged

unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of section 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought. (4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this

fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Injunctions; appropriate affirmative equitable relief; accrual of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful

employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or person discriminated against shall operate to reduce the back pay otherwise

allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged or any reason other then discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Provision of sections 101 to 105 of Title 29 not applicable to civil actions for prevention of unlawful practices

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

Proceedings by Commission to compel compliance with judicial orders

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

Appeals

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

Attorney's fee; liability of Commission and United States for costs

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the

United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Pub.L 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, § 4, Mar. 24, 1972, 86 Stat. 104.

28. U.S.C. § 1361.
Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Added Pub.L. 87-748, § 1(a), Oct. 5, 1962, 76 Stat. 744.

5 U.S.C. § 703.
Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter

in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L.94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.

29 C.F.R. PART 1613, Subpart G-Prohibition Against Discrimination Because of a Physical or Mental Handicap

Authority: 5 U.S.C. 7153: § 5.1 of the Civil Service Rules: 29 U.S.C. 791.

Source: 43 FR 12295, Mar. 24, 1978. Designated at 43 FR 60901, Dec. 29, 1978, unless otherwise noted.

GENERAL PROVISIONS

§ 1613.701 Purpose and applicability.

(a) Purpose. This subpart sets forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on account of physical or mental handicap and the regulations under which an agency will process complaints of discrimination based on a physical or mental handicap.

(b) Applicability. (1) This subpart applies to executive agencies as defined in section 105 of Title 5 of the United States Code and to those positions in the

legislative and judicial branches of the Federal Government and the government of the District of Columbia which are in the competitive service. (2) This subpart applies to the U.S. Postal Service and Postal Rate Commission. (3) This subpart applies only to applicants and employees who have a handicap as defined in § 1613.702(a).

§ 1613.702 Definitions

(a) "Handicapped person" is defined for this subpart as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

(b) "Physical or mental impairment" means (1) any physiological disorder or condition, cosmetic disfigurement, or

anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(c) "Major life activities: means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(d) "Has a record of such an impairment: means has a history of, or has been classified (or misclassified) as having a mental or physical impairment that

substantially limits one or more major life activities.

(e) "Is regarded as having such an impairment" means (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in (b) of this section but is treated by an employer as having such an impairment.

(f) "Qualified handicapped person" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question

without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used: (1) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

§1613.703 General policy.

Agencies shall give full consideration to the hiring, placement, and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person.

Agency Regulations For Processing Complaints Of Discrimination

§ 1613.708 General.

An agency shall provide regulations governing the acceptance and processing of complaints of discrimination based on a physical or mental handicap which comply with the principles and requirements in §§1613.213 through 1613.283 and §§ 1613.601 through 1613.643. Nothing in the foregoing shall be construed to postpone the effective date of this rule.

[46 FR 51384., Oct. 20, 1981]

§ 1613.709 Coverage.

(a) An agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against because of a handicap as defined in § 1613.702.

(b) An agency must process complaints of discrimination based on acts or actions that occurred 1 year prior to the effective date of these regulations Provided: (1) The complaint of discrimination was brought to the attention of the agency within 30 calendar days of the alleged discriminatory act, or, if a personnel action, within 30 calendar days of its effective date, (2) the complaint of discrimination was not adjusted under some other grievance or appeals procedure, and (3) the complaint of discrimination is filed within 180 calendar days of the effective date of these regulations. Complaints of discrimination based on alleged discriminatory acts or personnel actions that occurred on or after the effective date of these regulations are subject to

the time restraints set forth in § 1613.214(a).

(c) Notwithstanding the provision of subsection (b), a complainant may request an agency to process allegations of handicap discrimination which had been filed as a discrimination complaint or as a grievance, and were pending with the agency, the Civil Service Commission or in a Federal Court on April 10, 1978. Such requests for processing of allegations of handicap discrimination must be brought to the attention of the agency EEO counselor not later than 180 days from the publication of this subsection in final form in the FEDERAL REGISTER.

[43 FR 12295, Mar. 24, 1978, Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 4163, June 20, 1980]

29 C.F.R. Part 1613, Sub-Part B §§1613.213 through .283

§1613.213 Precomplaint Processing

(a) The agency shall require that an aggrieved person who believes that he or she was discriminated against because of race, color, religion, sex, national origin, age or handicapping condition consult with an Equal Employment Opportunity counselor to try to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he or she believes necessary into the matter; to seek a solution of the matter on a informal basis; to counsel the aggrieved person concerning the issues in the matter; to keep a record of the counseling activities so as to brief, periodically, the Equal Employment Opportunity Officer on those activities; and, when advised that a

complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing the counselor's actions and advice both to the agency and the aggrieved person concerning the issues in the matter. The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct the final interview with the aggrieved person no later than 21 calendar days after the date on which the matter was called to the counselor's attention by the aggrieved person. If, within 21 days, the matter has not been resolved to the satisfaction of the aggrieved person, that person shall be immediately informed in writing, at the time of the final interview, of his or her right to file a

complaint of discrimination. The notice shall inform the complainant of his or her right to file a discrimination complaint at any time up to 15 calendar days after receipt of the notice of the appropriate official with whom to file a complaint and of complainant's duty to assure that the agency is immediately informed if the complainant retains counsel, or any other representative. The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who consulted the counselor, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from that person.

(b) Upon initial contact or as soon thereafter as possible, the Equal Employment Opportunity Counselor shall inform each aggrieved person of the possible applicability of 5 U.S.C. 7121(d) to the alleged discriminatory action. The Equal Employment Opportunity Counselor shall communicate the substance of § 1613.219 concerning the election of remedies to each aggrieved person.

(c) The agency shall assure that full cooperation is provided by all employees to the Equal Employment Opportunity Counselor in the performance of his duties under this section.

(d) The Equal Employment Opportunity Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the

performance of his duties under this section.

[37 FR 22717, Oct. 21, 1972, as amended at 37 FR 25699, Dec. 2, 1972, Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24131, Apr. 9, 1980, 52 FR 41922, Oct.30, 1987]

§1613.214 Filing and processing of complaint

(a)Time Limits. (1)An agency shall require that a complaint be submitted in writing by the complainant or representative and be signed by the complainant. The complaint may be delivered in person or submitted my mail. The agency may accept the complaint for processing in accordance with this subpart only if:

(i) The complainant brought to the attention of the Equal Employment Opportunity counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the date of the alleged

discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew of the discriminatory event or personnel action; and

(ii) The complainant or representative submitted the written complaint to an appropriate official within 15 calendar days after the date of receipt of the notice of the right to file a complaint.

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or

appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with paragraph (a)(3) of this section.

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complaints. The agency shall acknowledge, in writing, to the complainant or representative receipt of the complaint and advise the complainant in writing of all administration rights and of the right to file a civil action as set forth in § 1613.281, including the time limits imposed on the exercise of these rights.

(4) The agency shall extend the time limits in this section when the complainant shows that he/she was not

notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency.

(b) Representative and official time. (1) At the stage in the processing of a complaint, including the counseling stage under § 1613.213, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(2) If the complainant is an employee of the agency, he/she shall have a reasonable amount of official time to prepare the complaint if otherwise on duty. If the complainant is an employee of the agency and he designates another employee of the agency as his/her representative, the

representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. However, the complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint.

(3) In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission (or the

agency prior to a hearing on the complaint) may, after giving the representative an opportunity to respond, disqualify the representative.

[52 FR 41922, Oct. 30, 1987]

§ 1613.215 Rejection or cancellation of complaint.

(a) The agency head or designee shall reject or cancel a complaint:

(1) That fails to state a claim under § 1613.212 or that states the same claim that is pending before or has been decided previously by the agency;

(2) That alleges that an agency is proposing to take action that may be discriminatory;

(3) That is the basis of a pending civil action in a United States District Court in which the complainant is a party;

(4) That is filed untimely, unless the agency extended the time limits in accordance with § 1613.214(a)(4);

(5) That the complainant elected to pursue under a negotiated grievance procedure as identified in § 1613.219;

(6) That the complainant has failed to prosecute. The agency may cancel an allegation or a complaint for failure to prosecute only after it has provided the complainant with a written request, that includes a notice of the proposed cancellation, to provide certain information or otherwise proceed with the complaint, and the complainant has failed to satisfy the request within 15 calendar days of its receipt. However, instead of canceling for failure to prosecute, the complaint may be adjudicated if sufficient

information for that purpose is available; or

(7) If the complainant refuses within 15 calendar days of receipt of an offer of settlement to accept an agency offer of full relief in adjustment of the complaint, provided that the agency's Director of Equal Employment Opportunity, or a designee reporting directly to the Director, has certified in writing that the agency's written offer of relief constitutes full relief. An offer of full relief under this subsection is the appropriate relief in § 1613.271. The offer need not contain the decision whether disciplinary action is necessary, but the basis for the decision shall be recorded separately from the complaint file.

(b) The agency head or designee shall transmit the decision to reject or cancel a complaint by letter to the complainant and the complainant's representative. The decision letter shall inform the complainant of the right to appeal the decision to the Commission, the time limit for filing an appeal with the Commission, and complainant's right to file a civil action as described in § 1613.281.

[52 FR 41923, Oct. 30, 1987]

§ 1613.216 Investigation.

(a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of the acceptance of a complaint. The Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the complaint shall not occupy a position in

the agency that is directly or indirectly under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the

complaint. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a persons' membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file. (As used in this subpart, the term "investigative file" shall mean the various documents and information acquired during the investigation under this section-including affidavits of the complainant and witnesses, and copies of, or extracts from records, policy

statements, or regulations of the agency-organized to show their relevance to the complaint or the general environment out of which the complaint arose.) If necessary, the investigator may obtain information regarding the membership or nonmembership of a person in the complainant's group by asking each person concerned to provide the information voluntarily; he shall not require or coerce an employee to provide this information.

(b) The Director of Equal Employment Opportunity shall arrange to furnish to the person conducting the investigation a written authorization:

(1) To investigate all aspects of complaints of discrimination.

(2) To require all employees of the agency to cooperate with him in the conduct of the investigation, and

(3) To require employees of the agency having any knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence.

(c) The Commission may assume responsibility for the investigation of any portion or all of an agency's complaints upon the execution of a memorandum of understanding to this effect with the agency. The agency shall reimburse the Commission for all expenses incurred in connection with the investigation. The Commission shall forward to the agency upon completion of the investigation the investigative file and the recommended proposed disposition.

The agency shall adopt as its proposed disposition of the complaint the Commission's recommended disposition unless within 30 days after the agency receives the investigative file and recommended disposition the complaint has been formally adjusted in accordance with § 1613.217(a) or the agency has notified the complainant of its own proposed disposition in accordance with § 1613.217(c).

[52 FR 41923, Oct. 30, 1987]

§ 1613.217 Adjustment of complaint and offer of hearing

(a) The agency shall provide an opportunity for adjustment of the complainant on an informal basis after the complainant has reviewed the investigative file. For this purpose, the agency shall furnish the complainant, or the complainant's representative if there is

one, a copy of the investigative file promptly after receiving if from the investigator, and provide opportunity for the complainant to discuss the investigative file with appropriate officials. If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant. An informal adjustment of a complaint may include an award of back pay, attorney's fees or other appropriate relief. Where the parties agree on an adjustment of the complainant, but cannot agree on whether attorney's fees or costs should be awarded or on the amount of attorney's fees or costs, the issue of the award of attorney's fees or costs or the amount

which should be awarded may be severed and shall be the subject of a final decision under § 1613.221(d). The decision of whether to award attorney's fees or costs or of the amount to be awarded may be the subject of an appeal to the Commission under the provisions of §§ 1613.231 through 1613.240.

(b) Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. If the complainant believes that the agency has failed to comply with the terms of settlement agreement, the complainant shall notify the Director of Equal Employment Opportunity, in writing, of the alleged noncompliance with the settlement agreement, within 30 days of when the complainant knew or should have known of

the alleged noncompliance. The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased under the terms of the settlement agreement. Upon receipt of the complainant's written allegation of noncompliance with the settlement agreement. The agency shall have thirty (30) calendar days in which to resolve the matter and to respond to the complainant, in writing, concerning the matter. If, after thirty (30) calendar days from the date of the agency's receipt of the complainant's written allegations of noncompliance with the settlement agreement, the agency has not responded to the complainant, in writing, or if the

complainant is not satisfied with the agency's attempt to resolve the mater, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement. The complainant may file such an appeal 35 days after service of the allegations of noncompliance, but must file an appeal within 20 days of receipt of an agency's determination. Prior to rendering its determination, the Commission may request that the parties submit whatever additional information or documentation it may deem necessary or it may direct that an investigation or hearing on the matter be conducted, as may be appropriate. If the Commission determines that agreement has not been complied with and the noncompliance is not attributable to acts or conduct of the

complainant, it may order such compliance or it may order that the complainant be reinstated for further processing from the point processing ceased under the terms of the settlement agreement. Complaints that alleged reprisal or further discrimination violate a settlement agreement shall be processed as individual complaints under § 1613.214 rather than under this section.

(c) If an adjustment of the complaint is not arrived at, the complainant shall be notified in writing:

(1) Of the proposed disposition of the complaint.

(2) Of the right to a hearing, unless a recommended decision is issued under § 1613.218(g), and decision by the agency head or designee if he/she notifies the agency in writing within 15 calendar

days of the receipt of the notice that he/she desires a hearing and

(3) Of the right to a decision by the head of the agency or designee without a hearing.

(d) If the complainant fails to notify the agency of his/her wishes within the 15-day period prescribed in paragraph (c) of this section, the appropriate Equal Employment Opportunity Officer may adopt the disposition of the complaint proposed in the notice sent to the complainant under paragraph (c) of this section as the decision of the agency on the complaint when delegated the authority to make a decision for the head of the agency under those circumstances. When this is done, the Equal Employment Opportunity Officer shall transmit the decision by letter to the complainant and the representative

which shall inform the complainant of the right of appeal to the Commission and the time limit applicable to such an appeal and of the right to file a civil action as described in § 1613.281. If the Equal Employment Opportunity Officer does not issue a decision under this paragraph, the complaint, together with the complaint file, shall be forwarded to the head of the agency or designee for decision under § 1613.221.

[52 FR 41924, Oct. 30, 1987]

§1613.218 Hearing.

(a) Administrative Judge. The hearing shall be conducted by a Commission Administrative Judge with an appropriate security clearance, except in instances where the Commission finds it is practical to delegate this responsibility to a complaints examiner or Administrative

Judge from another agency who shall not be an employee of the agency in which the complaint arose. (For purposes of this paragraph, the Department of Defense is considered to be a single agency.) When the Commission does not provide the Administrative Judge, it will supply the agency with the name of an Administrative Judge from another agency with an appropriate security clearance who has been certified by the Commission a qualified to conduct a hearing under this section.

(b) Arrangement for hearing. The agency in which the complaint arose shall transmit the complaint file containing all the documents described in § 1613.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the

investigative file (which shall be considered by the Administrative Judge in making a recommended decision on the complaint), to the Administrative Judge who shall review the complaint file to determine whether further investigation is needed before scheduling the hearing. When the Administrative Judge determines that further investigation is needed, the Administrative Judge shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of § 1613.216 apply to any further investigation by the agency on the complaint. The Administrative Judge shall schedule the hearing for a convenient time and place.

(c) Conduct of hearing. (1) Attendance at the hearing is limited to persons determined by the Administrative Judge to have a direct connection with the complaint. Hearings are part of the investigative process and are thus closed to the public.

(2) The Administrative Judge shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the Administrative Judge shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or employment policies or practices relevant to the complaint shall be received in evidence. The complainant and the agency, or the representative of either shall be given the opportunity at

the hearing to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

(d) Powers of Administrative Judge. In addition to the other powers vested in the Administrative Judge in accordance with this subpart, the Administrative Judge is authorized to:

(1) Administer oaths or affirmations;

(2) Regulate the course of the hearing;

(3) Rule on offers of proof and receive relevant evidence;

(4) Order the production of documents, records, comparative data, statistics, affidavits or the attendance of witnesses;

(5) Limit the number of witnesses whose testimony would be unduly repetitious; and

(6) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. In cases of repeated or flagrant contumacious conduct or misbehavior by a representative, the Administrative Judge may refer the matter to the Commission, and the Commission may, after giving the representative an opportunity to respond to the allegations of misconduct, suspend or disqualify the representative from further representational activity and report the misconduct to other appropriate authorities.

(e) If the complainant or agency in bad faith refuses or fails without adequate explanation to respond fully and in timely

fashion to requests made or approved by the Administrative Judge for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses, and the information is solely in the control of one party, such failure may, in appropriate circumstances, cause the Administrative Judge:

(1) To draw an adverse inference what the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(2) To consider the matters to which the requested information pertains to be established in favor of the opposing party;

(3) To exclude other evidence offered by the party failing to produce the requested information;

(4) To take such other actions as deemed appropriate.

(f) Witnesses at hearing. The Administrative Judge shall request any agency subject to this subpart to make available as a witness at the hearing an employee requested by the complainant when the Administrative Judge determines that the appearance of an employee is necessary. The Administrative Judge may also request the appearance of an employee of any federal agency whose testimony he determines is necessary to furnish information pertinent to the complaint under consideration. The Administrative Judge shall give the complainant his reasons for the denial of a request for the appearance of employees as witnesses and shall insert those reasons in the record of the hearing. An agency to whom

a request is made shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the Administrative Judge and it is not administratively impracticable to comply with the request for a witness, the agency to whom request is made shall provide an explanation to the Administrative Judge. If the explanation is inadequate, the Administrative Judge shall so advise the agency and it shall make the employee available as a witness at the hearing. If the explanation is adequate, the Administrative Judge shall insert it in the record of the hearing, and make arrangements to secure testimony from the employee at another time or through written interrogatory. An employee of an agency shall be in a duty status during

the time he/she is made available as a witness.

(g) If the Administrative Judge determines that there are no issues of material fact, the Administrative Judge may, after giving notice to the parties and providing them an opportunity to responde in writing within 15 calendar day, issue a recommended decision without holding a hearing. The recommended decision will conform to § 1613.218(i) in all other aspects.

(h) Record of hearing. The hearing shall be recorded and transcribed verbatim. All documents submitted to, and accepted by, the Administrative Judge at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If

the complainant submits a document that is accepted, the Administrative Judge shall make the document available to the agency representative for reproduction.

(i) Findings, analysis, and recommendations. The Administrative Judge shall transmit to the head of the agency or designee:

(1) The complaint file (including the record of the hearing);

(2) The findings and analysis of the Administrative Judge with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose; and

(3) The recommended decision of the Administrative Judge on the merits of the complaint, including recommended remedial action, where appropriate, with regard to the matter which gave rise to the

complaint and the general environment out of which the complaint arose.

The Administrative Judge shall notify the complainant of the date on which this was done. In addition, the Administrative Judge shall transmit, by separate letter to the Director of Equal Employment Opportunity, whatever findings and recommendations he considers appropriate with respect to conditions in the agency which do not bear directly on the matter which gave rise to the complaint or which bear on the general environment out of which the complaint arose.

[52 FR 41925, Oct. 30, 1987]

§ 1613.219 Relationship to grievance procedures.

(a) Allegations of discrimination on grounds of race, color, religion, sex, national origin, age or handicapping condition may be raised under a grievance

procedure by employees in agencies that are subject to the provisions of 5 U.S.C. 712(d) and who are covered by a collective bargaining agreement that provides for allegations of discrimination to be raised in the negotiated grievance procedure. Allegations of discrimination by employees not covered by such a negotiated grievance procedure or by employees of agencies not subject to 5 U.S.C. 712(d) shall be processed as complaints under § 1613.214 et seq.

(b) In cases where a person is covered by a negotiated grievance procedure permitting allegation of discrimination, a person wishing to file a complaint or grievance on a matter of alleged employment discrimination must elect the forum in which to pursue the matter; either the process described in this part

or a negotiated grievance procedure. An aggrieved employee who files a grievance in writing with an agency whose negotiated agreement with an employee organization permits the acceptance of grievance which allege discrimination prohibited by this subpart, may not there after file a complaint on the same matter under the provisions of this subpart irrespective of whether the grievance has raised an allegation of discrimination within the negotiated grievance procedure. Any such complaints filed after a grievance has been filed on the same matter shall be rejected without prejudice to the complainant's rights to proceed through the negotiated grievance process, including the complainant's right to request the Commission to review a final decision as provided in 5 U.S.C. 7121(d)

and at § 1613.231(b). The agency decision letter rejecting such a complaint shall advise the complainant of the right to appeal the agency decision to the Commission. An election, pursuant to this paragraph, to proceed under this part is indicated only by the filing of a formal complaint, in writing. Use of the pre-complaint process as described in § 1613.213 does not constitute an election for the purposes of this section.

[52 FR 41925, Oct. 30, 1987]

§ 1613.220 Avoidance of delay.

(a) The complaint shall be resolved promptly. To this end, both the complainant and the agency shall proceed with the complaint without undue delay so that the complaint is resolved within 180 calendar days after it was filed, including time spent in the processing of

the complaint by the Administrative Judge under § 1613.218.

(b) The head of the agency or designee shall cancel a complaint if the complainant fails to prosecute the complaint without undue delay by following the procedures for canceling a complaint under § 1613.215.

(c) The agency shall furnish the Commission reports on all complaints pending within the agency in a form specified by the Commission. If an agency has not issued a final decision, and has not requested the Commission to supply an Administrative Judge or complaints examiner, within 75 calendar days from the date a complaint was filed, the Commission may require the agency to take special measures to insure prompt processing of the complaint or may assume responsibility

for processing the complaint, including supplying an investigator to conduct any necessary investigation on behalf of the agency. When the Commission supplies an investigator, the agency shall reimburse the Commission for all expenses incurred in connection with the investigation and shall notify the complainant in writing of the proposed disposition of the complaint no later than 15 calendar days after its receipt of the investigative report.

(d) When the Administrative Judge has submitted a recommended decision it shall become a final decision binding on the agency 60 calendar days after the receipt of the complete complaint file and the recommended decision by the agency unless the agency has already issued a final decision. In such event, the agency shall so notify the complainant of the decision

and furnish to him a copy of the findings, analysis, and recommended decision of the Administrative Judge under § 1613.218(i) and a copy of the hearing record and also shall notify him in writing of the right to appeal to the Commission and also shall notify him in writing of the right to appeal to the Commission and the time limits applicable to such an appeal and of the right to file a civil action as described in § 1613.281. The agency shall provide the Administrative Judge with a copy of its final decision on each complaint on which a recommended decision has been issued.

[37 FR 22717, Oct. 21, 1972, Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 52 FR 10085, Mar. 30, 1987, 52 FR 41926, Oct. 30, 1987]

§ 1613.221 Decision by head of agency or designee.

(a) The head of the agency or designee shall make the decision of the agency on a complaint based on the preponderance of evidence in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

(b)(1) The decision of the agency shall be in writing, shall reflect the date of its issuance, and shall be transmitted to the complainant and his or her representative either by certified mail, return receipt requested, or by any other method which enables the agency to show the date of receipt.

(2) When the Administrative Judge has issued a recommended decision on the complaint under § 1613.218(g) or (i)(3), the decision letter shall transmit a copy

of such recommended decision and a copy of the hearing record if a hearing was held. The decision of the agency shall adopt, reject, or modify the decision recommended by the Administrative Judge. If the decision is to reject or modify the recommended decision, the decision letter shall set forth the specific reasons in detail for rejecting or modifying the findings of fact or conclusions of law made by the Administrative Judge.

(3) When there has been no hearing and no recommended decision under § 1613.218(g), the decision letter shall set forth the findings, analysis, and decision of the head of the agency or his designee.

(c) The decision of the agency shall require any remedial action authorized by the law determined to be necessary or desirable to resolve the issue of

discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. When discrimination is found, the agency shall:

(1) Advise the complainant and his or her representative that any request for attorney's fees or costs must be documented and submitted within 20 calendar days of receipt.

(2) Require remedial action to be taken in accordance with § 1613.271.

(3) Review the matter giving rise to the complaint to determine whether disciplinary action is appropriate; and

(4) Record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be recorded in the complaint file.

(d) When the final agency decision provides for an award of attorney's fees or costs, the amount of these awards shall be determined under § 1613.222(c). In the unusual situation in which the agency determines not to award attorney's fees or costs to a prevailing complainant, the agency shall set forth in its decision the specific reasons for denying the award.

(d) The decision letter shall inform the complainant of his or her right to appeal the decision of the agency to the Commission, and shall include the text of § 1613.233 (a) or (b), as appropriate. The decision letter shall also inform the complainant of his or her right to file a civil action in accordance with § 1613.281, and of the time limits applicable to such an appeal.

[52 FR 41926, Oct. 30, 1987]

§ 1613.222 Complaint file.

The agency shall establish a complaint file. Except as provided in § 1613.221(c), this file shall contain al documents pertinent to the complaint.

(a) The complaint file shall include copies of:

(1) The notice of Equal Employment Opportunity Counselor to the aggrieved person under § 1613.213(a);

(2) The written report of Equal Employment Opportunity Counselor on whatever precomplaint counseling efforts were made with regard to the complainant's case;

(3) The complaint;

(4) The investigative file;

(5) If the complaint is withdrawn by the complainant, a written statement of

the complainant or representative to that effect;

(6) If adjustment of the complaint is arrived at under § 1613.217, the written record of the terms of adjustment;

(7) If no adjustment of the complaint is arrived at under § 1613.217, a copy of the letter notifying the complainant of the proposed disposition of the complaint and of the right to a hearing and documentation of the attempt to adjust the complaint;

(8) If decision is made under § 1613.217(d), a copy of the letter to the complainant transmitting that decision;

(9) If a hearing was held, the record of the hearing, together with the Administrative Judge's findings, analysis and recommendations, if any, made to the head of the agency or designee;

(10) If the Director of Equal Employment Opportunity is not the designee, the recommendations, if any, made by the Director to the head of the agency or designee;

(11) If decision is made under § 1613.221, a copy of the letter transmitting the decision of the head of the agency or designee, and;

(12) Proof of the date of receipt of final agency decision, as required under § 1613.221(b)(1).

(b) The complaint file shall not contain any document that has not been made available to the complainant or the complainant's designated physician under 5 CFR 294.401.

[52 FR 41927, Oct. 30, 1987]

APPEAL TO THE COMMISSION

§1613.231 Right to appeal to the Commission

(a) A complainant may appeal to the Commission the decision of the head of the agency or designee:

(1) To reject or cancel the complaint or any portion for reasons covered by §1613.215; or

(2) Under the circumstances set forth in §1613.217(b); or

(3) On the merits of the complaint, under §1613.217(d), §1613.220(d) or §1613.221, or on the award of attorney's fees or costs.

(b) A complainant may appeal to the Commission on issues of employment discrimination raised in a negotiated grievance procedure covered by § 1613.219(a), where the agency's negotiated labor-management agreement permits such

issues to be raised. A complainant may appeal the decision:

(1) Of the agency head or designee on the grievance;

(2) Of the arbitrator on the grievance; or

(3) Of the Federal Labor Relations Authority (FLRA) on exceptions to the arbitrator's award.

A complainant may not appeal under this subsection, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration or is before the FLRA. Any appeal prematurely filed in such circumstances shall be dismissed without prejudice.

[52 FR 41927, Oct. 30, 1987]

§ 1613.232 Where to appeal.

The complainant shall file his appeal in writing, either personally or by mail, with the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 5203 Lessburg Pike, Suite 900, Falls Church, Virginia 22041.

[51 FR 22519, June 20, 1986]

§ 1613.233 Time limit.

(a) Except as provided in paragraph (c) of this section, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. An appeal shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received by the Commission. Any statement or brief in support of the appeal must be submitted to the Commission

and to the defendant agency within 30 calendar days of filing the notice of appeal. For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a decision to award attorney's fees or costs is made, the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

(b) When issues of discrimination have been raised in a negotiated grievance process, a complainant may file a Notice of Appeal of such issues up to 20 days after: (1) Receipt of an agency decision on the grievance and expiration of the time during which the union and the agency

may move the matter to the next state of the grievance process; (2) receipt of an arbitrator's award; or (3) receipt of the decision of the FLRA on exceptions to the arbitrator's award.

(c) The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based upon a written statement by the complainant showing that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the Appeal.

[44 FR 34495, June 15, 1979, as amended at 48 FR 19797, May 2, 1983]

§ 1613.234 Appellate procedures and finality.

(a) Procedures. On behalf of the Commission, the Office of Review and Appeals shall review the complaint file and all relevant written representations submitted by either party. The Office may remand a complaint to the agency for further investigation or a rehearing if it considers that action necessary or have additional investigation conducted by Commission personnel. There is no right to a hearing before the Office or the Commission upon appeal. The Office or the Commission shall issue a written decision setting forth its reasons for the decision and shall send copies to the complainant, the complainant's designated representative, and the agency. When corrective action is ordered, the agency shall report within the time specified to

the Office that the corrective action has been taken.

(b) Finality. A decision issued under this section is final within the meaning of §§ 1613.281 and 1613.641 unless:

(1) Within 30 days of receipt of a decision issued under paragraph (a) of this section, either party files a timely request to reopen pursuant to § 1613.235, or

(2) The Commission on its own motion reopens the case.

[52 FR 41927, Oct. 30, 1987]

§ 1613.235 Reopening and reconsideration.

(a) The Commission may, in its discretion, reopen and reconsider any decision of the Commission notwithstanding any other provisions of this part.

(b) Parties may request reopening or reconsideration provided that such request

is made within 30 days of receipt of a decision issued pursuant to § 1613.234 or within 20 days of receipt of another party's timely request to reopen. Such requests shall be submitted to the Office of Review and Appeals. The request shall contain arguments or evidence which tend to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued; or

(2) The previous decision involved an erroneous interpretation of law or regulation or misapplication of established party; or

(3) The decision is of such exceptional nature as to have effects beyond the actual case at hand.

(c)(1) The party requesting reopening or reconsideration shall submit copies of

the request and supporting documents to all other parties and their representatives at the time of the request along with proof of such submission.

(2) Any argument in opposition to the request to reopen or cross request to reopen shall be submitted to the Office of Review and Appeals and to the requesting party within 20 days of receipt of the request to reopen along with proof of such submission.

(d) A decision on a request to reopen by either party is final and there is no further right by either party to request reopening.

[52 FR 41927, Oct. 30, 1987]

§ 1613.236 [Reserved]

§ 1613.237 Corrective action.

(a) Corrective action ordered by the Office of Review and Appeals or the

Commission is mandatory and binding on the agency except as provided in § 1613.234(b). Failure to implement ordered relief shall be subject to judicial enforcement as specified in § 1613.239(c).

(b) When the agency requests reopening and when the case involves removal, separation, or suspension continuing beyond the date of the request to reopen, and when the decision removal, separation, or suspension continuing beyond the date of the request to reopen, and when the decision recommends retroactive restoration, the agency shall comply with the decision only to the extent of the temporary or conditional restoration of the employee to duty status in the position recommended by the Commission, pending the outcome of the agency request for reopening.

(1) Service under the temporary or conditional restoration provisions of this paragraph shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, provided the Commission-

(i) Upholds its decision after reopening the case, or

(ii) Refuses to reopen.

(2) The agency shall notify the Commission and the employee in writing, at the same time it requests reopening, that the remedial actin it takes is temporary or conditional.

(c) When no request for reopening is filed within 30 days of receipt of the decision, or when a request to reopen is denied, the agency shall execute the

action ordered and there is no further right to delay implementation of the ordered relief. The corrective action shall be completed not later than sixty (60) days after the decision becomes final.

[52 FR 41928, Oct. 30, 1987]

§ 1613.238 Enforcement of final decisions.

(a) Petition for enforcement. A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction. The petition shall be submitted to the Office of Review and Appeals. The petition shall specifically set forth the reasons that lead the complainant to believe that the agency is not complying with the decision.

(b) Compliance. On behalf of the Commission, the Office of Review and

Appeals shall take all necessary action to ascertain whether the agency is implementing the decision of the Commission. If the agency is found not to be in compliance with the decision, efforts shall be undertaken to obtain compliance.

(c) Clarification. On behalf of the Commission, the Office of Review and Appeals may, on its own motion or in response to a petition for enforcement or in connection with a timely request to reopen, issue a clarification of a prior decision. A clarification cannot change the result of a prior decision or enlarge or diminish the relief ordered but may further explain the meaning or intent of the prior decision.

(d) Referral to the Commission. Where the Director, Office of Review and

Appeals, is unable to obtain satisfactory compliance with the final decision, the Director shall submit appropriate findings and recommendations for enforcement to the Commission, or, as directed by the Commission refer the matter to another appropriate agency.

[52 FR 41928, Oct. 30, 1987]

§ 1613.239 Enforcement action by the Commission

(a) Notice to show cause. The Commission may issue a notice to the Head of any federal agency that has failed to comply with a decision to show cause why there is noncompliance. Such notice may request the Head of the agency or representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons why compliance or with

compelling reasons why compliance has not been effectuated.

(b) Certification to the Office of Special Counsel. Where appropriate and pursuant to the terms of a memorandum of agreement, the Commission may refer the matter to the Office of Special Counsel of enforcement action.

(c) Notification to complainant of completion of administrative efforts. Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit its report of corrective action, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to section 717 to Title VII, section 15 of the Age Discrimination in Employment Act, or section 505 of the

Rehabilitation Act, and to seek judicial review of the agency's refusal to implement corrective action pursuant to the Administrative Procedure Act, 5 U.S.C. 701 et seq., and the Mandamus Statute, 28 U.S.C. 1361, or commence de novo proceedings pursuant to the appropriate statutes.

[52 FR 41928, Oct. 30, 1987]

§ 1613.240 Computation of time.

With respect to time periods specified in this subpart:

(a) The first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday, or Federal holiday, in which case the period shall be extended to include the next business day; and

(b) A document shall be deemed timely if it is delivered in person or postmarked before the expiration of the applicable filing period, or if, in the absence of a legible postmark, it is received by mail within five days from the expiration of the applicable filing period.

[52 FR 41928, Oct. 30, 1987]

REPORT TO THE COMMISSION

§ 1613.241 Reports to the Commission on complaints

Each agency shall report to the Commission information concerning precomplaint counseling and the status and disposition of complaints under this subpart at such times and in such manner as the Commission prescribes.

CONSOLIDATION OF COMPLAINTS

§ 1613.251 Joint processing and consolidation of complainants

(a) Two or more complaints of discrimination filed by employees or applicants for employment with the agency consisting of substantially similar allegations of discrimination may, with the written permission of the complainants, be consolidated by the agency or Commission.

(b) Two or more individual complaints of discrimination from the same employee or applicant for employment may, at the discretion of the agency or the Commission, be joined for processing after notifying the individual that the complaints will be processed jointly.

[42 FR 11808, Mar. 1, 1977, Redesignated at 43 FR 6091, Dec. 29, 1978]

FREEDOM FROM REPRISAL OR INTERFERENCES

§ 1613.261 Freedom from restraint, interference, coercion and reprisal.

It is unlawful to restrain, interfere, coerce or discriminate against complainants, their representatives, witnesses, Directors of Equal Employment Opportunity, Equal Employment Opportunity Officers, Investigators, Counselors and other agency officials with responsibility for processing discrimination complaints because of involvement with a discrimination charge during any stage in the presentation and processing of a complaint, including the counseling stage under § 1613.213, or because an individual filed a charge of discrimination, testified, assisted or participated in any manner with an investigation, proceeding or hearing or because of any opposition to

an unlawful employment practice under this part.

[52 FR 41928, Oct. 30, 1987]

§ 1613.262 Review of allegations or reprisal.

(a) An individual who alleges a violation of § 1613.261 may have the allegation reviewed as an individual complaint of discrimination under §§ 1613.21 through 1613.283.

(b) When a complainant alleges a violation of § 1613.261 in connection with the filing of a prior discrimination complaint and the prior complaint in process at the agency when the allegation is made, the complainant may request the agency to consolidate the reprisal allegation with the prior complaint. If the prior complaint is at the hearing stage of the complaint process under § 1613.218, the complainant may request the

Administrative Judge to consolidate the allegation with the complaint at the hearing. The agency or Administrative Judge the complainant, the representative and the agency cannot reach an agreement on the amount of attorney's fees or costs within 20 calendar days of receipt of the verified statement and accompanying affidavit, the agency shall issue a decision determining the amount of attorney's fees or costs within 30 calendar days of receipt of the statement and affidavit. Such decision shall include the specific reasons for determining the amount of the award.

(i) The amount of attorney's fees shall be calculated in accordance with the existing case law using following standards:

(A) The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate.

(B) This amount may be reduced or increased in considering the following factors, although ordinarily many of these factors are subsumed within the calculation set forth above: The time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorney due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation, and ability of the attorney, the undesirability of the case, the nature

and length of the professional relationship with the client, and the awards in similar cases. Only in some cases of exceptional success shall any of these factors be used to enhance an award computed by the formula set forth in paragraph (d)(2)(i)(A).

(ii) The costs which may be awarded are those authorized by 28 U.S.C. 1920 to include-

(A) Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case;

(B) Fees and disbursements for printing and witnesses; and

(C) Fees for exemplification and copies of papers necessarily obtained for use in the case. Witness fees shall be awarded in accordance with the provisions of 28 U.S.C. 1821, except that no award

shall be made for a federal employee who is in a duty status when made available as a witness.

[52 FR 41929, Oct. 30, 1987]

RIGHT TO FILE A CIVIL ACTION

§ 1613.281 Statutory right.

An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate United States district court:

(a) Within thirty (30) calendar days of receipt of notice of final action taken by the agency on a complaint;

(b) After one hundred and eighty (180) calendar dates from the date of filing a complaint with the agency if there has been no decision;

(c) Within thirty (30) calendar days after receipt of final action taken by the Commission on the complaint; or

(d) After one hundred and eighty (180) calendar days from the date of filing an appeal with the Commission, if there has been no Commission decision.

For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a determination to award attorneys fees is made the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

[45 FR 24133, Apr. 9, 1980]

§ 1613.282 Notice of right.

An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any final action on a complaint under §§ 1613.215, 1613.217, 1613.220 or § 1613.221. The Commission shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit to filing, in any decision under § 1613.234.

[37 FR 22717, Oct. 21, 1972, as amended at 37 FR 25699, Dec. 2, 1972, Redesignated at 43 FR 60901, Dec. 29, 1978]

§ 1613.283 Effect on administrative processing.

The filing of a civil action by an employee or applicant involving a complaint filed under this subpart terminates processing of that complaint.

29 C.F.R. Part 1613, Appendix A

Appendix A to Part 1613-Policy Statement

on Remedies and Relief for Individual Cases of Unlawful Discrimination

On September 11, 1984, the Equal Employment Opportunity Commission announced its intent to achieve certainty and predictability of enforcement in those situations where the agency has reason to believe that a law it enforces has been violated. In keeping with this goal, the Commission recognizes that the basic effectiveness of the agency's law enforcement program is dependent upon securing prompt, comprehensive and complete relief for all individuals directly affected by violations of the statutes which the agency enforces. The Commission also recognizes that, in appropriate circumstances, remedial measures need to be designed to prevent the recurrence of similar unlawful employment practices. Predictable

enforcement and full, corrective, remedial and preventive relief are the principal components of the method with which the Commission intends to pursue this agency's mission of eradicating discrimination in the workplace. Henceforth, in negotiating settlements, in drafting prayers for relief in litigation, pleadings or in issuing Commission Decisions or Orders, obtaining full remedial, corrective and preventive relief is the standard by which the agency is to be guided.

The Commission believes that a full remedy must be sought in each case where a District Director concludes the case has merit and has, or is prepared to, issue a letter of violation or a letter finding reasonable cause to believe that one of the statutes the agency enforces has been violated. The remedy must be fashioned

from the wide range of remedial measures available to this law enforcement agency which has broad authority under the statutes it enforces to seek appropriate forms of legal and equitable relief. The remedy must also be tailored, where possible, to cure the specific situation which gave rise to the violation of the statute involved.

Accordingly, all remedies and relief sought in court, agreed upon in conciliation, or ordered in Federal sector decisions should contain the following elements in appropriate circumstances:

(1) A requirement that all employees of respondent in the affected facility be notified of their right to be free of unlawful discrimination and be assured that the particular type of discrimination found or conciliated will not recur;

(2) A requirement that corrective, curative or preventive action be taken, or measures adopted, to ensure that similar found or conciliated violations of the law will not recur;

(3) A requirement that each identified victim of discrimination be unconditionally offered placement in the position the person would have occupied but for the discrimination suffered by that person;

(4) A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) A requirement that the respondent cease from engaging in the specific unlawful employment practice found or conciliated in the case.

The components of these remedial elements are as follows:

(1) Notice Requirements.

All respondents should be required to sign and conspicuously post, for a period of time, a notice to all employees in the affected facility (or to union members if respondent is a labor organization), prepared by the agency on E.E.O.C. forms, specifically advising respondent's employees or members of the following:

(a) That the notice is being posted as part of the remedy agreed to pursuant to a conciliation agreement with the agency or pursuant to an order of a particular Federal court or pursuant to a decision and order in a Federal sector case.

(b) That Federal law requires that there be no discrimination against any

employee or applicant for employment because of the employee's race, color, religion, sex, national origin or age (between 40 and 70) with respect to hiring, firing, compensation, or other terms, conditions or privileges of employment (Federal sector notices will include handicap as an unlawful basis of discrimination).

(c) That respondent supports and will comply with such Federal law in all respects and will not take any action against employees because they have exercise their rights under the law.

(d) That respondent will not engage in the specific unlawful conduct which the District Director believes has occurred or

is conciliating, or which the Commission or a court has found to have occurred.[1]

(e) That respondent will, or has, taken the remedial action required by the conciliation agreement or the order of the Commission or Court.[2]

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[1]For example, the following types of assurances could be required of a respondent which committed several types of unlawful employment practices in a particular case;

"XYZ, Inc. will not refuse to hire employees on the basis of their sex;

"XYZ, Inc. will not refuse to promote employees on the basis of their sex or their race; and

"XYZ, Inc. will not threaten to fire employees because they have filed charges with the Equal Employment Opportunity Commission."

[2]For example, employees could be notified of the relief obtained in the following way:

XYZ, Inc. will promote and make whole the employees affected by our conduct for any losses they suffered as a result of the discrimination against them. Specifically, Mary Jones and Susan Smith will be promoted to the position of shift supervisor and will be made whole for any loss in pay or benefits they may have suffered since the time that we failed to

(2) Corrective, Curative or Preventive Provisions.

In appropriate circumstances, a remedy must provide that the respondent take corrective, curative or preventive action designed to ensure that similar violations of the law will not recur. Similarly, corrective, curative or preventive measures may also be adopted in those situations where those measures are likely to prevent future similar violations.

Thus, where a policy or practice is discriminatory, the policy or practice must be changed. Similarly, if a

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promote them to that position.

"XYZ, Inc. has adopted an equal employment opportunity policy and will ensure that all supervisors in making selections for promotions abide by the requirements of that policy that employees not be discriminated against on the basis of their sex or race."

particular supervisor or other agent of the respondent is identified as knowingly or intentionally being responsible for the discrimination that occurred, the respondent must be required to take corrective action so that the discriminatee or similarly situated employees not be subjected to similar discriminatory conduct. This corrective action may be accomplished, for example, by insulating employees from that individual for a period of time, or by requiring the respondent to discipline or remove the offending individual from personnel authority, or by requiring the respondent to educate the offender and other supervisors so that they may overcome their unlawful prejudices.

These and any other appropriate measures, or any combination thereof,

designed to meet this goal should be considered when negotiating settlements or drafting prayers for relief. This type of relief is not to be designed for punitive purposes. Rather, this relief is to be tailored to cure or correct the particular source of the identified discrimination and to minimize the chance of its recurrence.

In addition, the respondent must be required to take all other appropriate steps to eradicate the discrimination and its effects, such as the expunging of adverse materials relating to the unlawful employment practice from the discriminatee's personnel files.

(3) Nondiscriminatory Placement.

Each identified victim of discrimination is entitled to an immediate and unconditional offer of placement in the

respondent's workforce, to the position the discriminatee would have occupied absent discrimination, or to a substantially equivalent position, even if the placement of the discriminatee results in the displacement of another or respondent's employees ("Nondiscriminatory Placement"). The Nondiscriminatory Placement may take place by initial employment, reinstatement, promotion, transfer or reassignment and must occur without any prejudice to, or loss of, any employment - related rights or privileges the discriminatee would have otherwise acquired had the discrimination not occurred.

If a Nondiscriminatory Placement position that the discriminatee should occupy no longer exists, then employment for which the discriminatee is qualified

must be offered to the discriminatee in other areas of the respondent's operation. Finally, if none of the foregoing positions exist in which the discriminatee may be placed, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

It is essential that victims of discrimination not suffer further and that respondents not gain by their misconduct. Accordingly, the contention by a respondent that a discriminatee is no longer suitable for Nondiscriminatory Placement due to a loss of skills, a change in job content or some other reason is not an acceptable excuse for a respondent's failure to accomplish a Nondiscriminatory Placement of a discriminatee. The burden is upon the

respondent to demonstrate that the inability of the discriminatee to accept Nondiscriminatory Placement is unrelated to the respondent's discrimination such that the victim, rather than the respondent, should bear the loss. Similarly, the burden is also on the respondent to demonstrate a contention that postdiscrimination conduct by a discriminatee renders the discriminatee unworthy of Nondiscriminatory Placement.

In certain circumstances, the Nondiscriminatory Placement of a victim of discrimination may require the job placement of another of the respondent's employees. If displacement of an incumbent employee in order to accomplish Nondiscriminatory Placement on behalf of a discriminatee is clearly inappropriate in a particular setting or is unavailable as

a remedy in a particular jurisdiction, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

(4) Backpay.

Each identified victim of discrimination is entitled to be made whole for any loss of earnings the discriminatee may have suffered by reason of the discrimination. Each individual discriminatee must receive a sum of money equal to what would have been earned by the discriminatee in the employment lost through discrimination ("Gross Backpay") less what was actually earned from other employment during the period, after normal expenses incurred in seeking and holding the interim employment have been deducted ("Net Interim Earnings"). The difference between Gross Backpay and Net Interim

Earnings is Net Backpay Due. Interest should be computed on all Net Backpay Due. Net Backpay accrues from the date of discrimination, except where the statutes limit the recovery, until the discrimination against the individual has been remedied.

Gross Backpay includes all forms of compensation such as wages, bonuses, vacation pay, and all other elements of reimbursement and fringe benefits such as pension and health insurance. Gross Backpay must also reflect fluctuations in working time, overtime rates, changing rates of pay, transfers, promotions, and other perquisites of employment that the discriminatee would have enjoyed but for the discrimination. In appropriate circumstances under the Equal Pay Act and the Age Discrimination in Employment Act

liquidated damages based on backpay will also be available.

(5) Cessation Provisions.

All respondents must agree or be ordered to cease from engaging in the specific unlawful employment practices involved in the case. For example, a respondent should agree to cease discriminating on the unlawful basis and in the specific manner alleged or a respondent might be required to cease giving effect to certain specific discriminatory policies, practices or rules. In circumstances where a particular respondent has committed or has conciliated several unlawful employment practices, consideration must be given to including broad cessation language in an agreement or order which is designed to

order the cessation of any further unlawful employment practices.

The Commission does not believe that the statutory requirements of conciliation requires the agency to abdicate its principal law enforcement responsibility. Thus, conciliation should not result in inadequate remedies. The possibility of pre-litigation conciliation does not constitute cause for unwarranted or undeserved concessions by a law enforcement agency when one of the laws it enforces has been violated. Rather, the concept of settlement constitutes recognition of the fact that there may be reasonable differences as to a suitable remedy between the maximum which may be reasonably demanded by the agency and the minimum which in good faith may be fairly argued for the respondent. Within this

scope, conciliation must be actively pursued by the agency. In this regard, in all cases in which the District Director believes that one of the statutes the agency enforces has been violated or in which litigation has been authorized, full remedies containing the appropriate elements as set forth in this memorandum should be sought. In conciliation efforts, reasonable compromises or counterproposals to the full range of remedies described in this policy may be considered if those compromises or counterproposals address fully the remedial concepts described in this policy. Conciliation should be pursued with the goal of obtaining substantially complete relief through the conciliation process. Any divergence from this goal

must be justified by the relevant facts and the law.

EXECUTIVE ORDER NO. 11478

[Aug. 8, 1969, 34 F.R. 12985, as amended by Ex.Ord No. 11590, Apr. 23, 1971, 36 F.R. 7831; Ex.Ord. No. 12106, Dec. 26, 1978, 44 F.R. 1053.]

EQUAL EMPLOYMENT OPPORTUNITY IN FEDERAL GOVERNMENT

NOW, THEREFORE, under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment

opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Sec. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive

and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the

effectiveness with which the policy of this Order is being carried out.

Sec. 3. The Equal Employment Opportunity Commission shall be responsible for directing and furthering the implementation of the policy of the Government of the United States to provide equal opportunity in Federal employment for all employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) and to prohibit discrimination in employment because of race, color, religion, sec, national origin, handicap, or age.

Sec. 4. The Equal Employment Opportunity Commission, after consultation with all affected departments and agencies, shall issue such rules, regulations, orders, and instructions and request such information

from the affected departments and agencies as it deems necessary and appropriate to carry out this Order.

Sec. 5. All departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this Order and shall furnish the Commission such reports and information as it may request. The head of each department or agency shall comply with rules, regulations, orders and instructions issued by the Equal Employment Opportunity Commission pursuant to Section 4 of this Order.

Sec. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code [section 102 of Title 5, Government Organization and Employees], and executive

agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code [section 105 of Title 5, Government Organization and Employees], and to the employees thereof (including employees paid from nonapropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States.

Sec. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

Sec. 8. This Order shall be applicable to the United States Postal Service and to the Postal Rate Commission established by the Postal Reorganization Act of 1970 [Title 39, Postal Service].

Richard Nixon

(2)

No. 90-863

SUPREME COURT, U.S.
FILED
FEB 15 1991
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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

SABAT QUINONES CANDELARIO, PETITIONER

v.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether principles of administrative res judicata preclude the Postmaster General from raising a postal employee's failure to mitigate damages in an action to enforce a decision of the Equal Employment Opportunity Commission.

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In the Supreme Court of the United States

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TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 906 F.2d 798. The opinion of the district court (Pet. App. A22-A46) is reported at 715 F. Supp. 414.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1990. A petition for rehearing was denied on September 4, 1990. Pet. App. A87-A88. The petition for a writ of certiorari was filed on November 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a veteran who is partially disabled by a back condition, was hired by the United States Postal Service as a probationary part-time postal clerk in August 1979. On September 6, 1979, the Postal Service discharged petitioner on the basis of a medical determination that his back condition was incompatible with heavy lifting and other physical requirements of the job. Petitioner filed a complaint with the Postal Service asserting that the Service had unlawfully discriminated against him on account of his disability, in violation of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 390 (codified at 29 U.S.C. 701 *et seq.*). See 29 C.F.R. Pt. 1613.[1] The Postal Service issued a final agency decision finding that petitioner's termination was not discriminatory. Pet. App. A5-A6, A23-A25, A64-A69.

Petitioner appealed to the Equal Employment Opportunity Commission (EEOC), which rendered a decision in his favor in April 1985. Pet. App. A63-A82. The sole issue considered by the EEOC was "whether the record supports a finding of no discrimination." *Id.* at A73. The EEOC determined that petitioner's discharge was improperly based on his physical condition and ordered the Postal Service to "reinstate [petitioner] at the paygrade he would normally have reached if not terminated, and award him backpay for the period from his termination to his reinstatement." *Id.* at A78. The EEOC neither considered nor determined the amount of back pay due petitioner, and the parties presented no argument or evidence on this question. See *id.* at A37.

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[1] The procedures of 29 C.F.R. Pt. 1613 apply to employment discrimination complaints by federal employees. The procedures of 29 C.F.R. Pt. 1601 apply to discrimination complaints by state and private employees.

2. The Postal Service reinstated petitioner in June 1985. In accordance with the requirement that "[i]nterim earnings or amounts earnable with reasonable diligence by the person * * * discriminated against shall operate to reduce the back pay otherwise allowable," 42 U.S.C. 2000e-5(g),[2] the Postal Service asked petitioner to submit proof of his earnings and efforts to obtain other employment during the back pay period. Petitioner submitted documents indicating that, apart from 100 hours of part-time work, he had no interim earnings. Petitioner's submissions showed that he had not sought unemployment compensation during the back pay period, and that he was a full-time university student for three years. See C.A. App. 16-18. In March 1986, the Postal Service determined that petitioner had not made reasonable efforts to obtain other employment and denied him back pay. Pet. App. A27-A28.

Petitioner submitted additional documents in August 1986, including undated applications for employment, a letter stating that he had been a student in a vocational rehabilitation program, and a handwritten log setting forth the names and business cards of employers that he claimed to have contacted. C.A. App. 20. Upon investigation, the Postal Service determined that the additional materials were suspect, and again denied petitioner's claim for back pay. Pet. App. A31.

3. Petitioner then brought an enforcement action in district court. See 42 U.S.C. 2000e-5(g), 2000e-16(c); 29 C.F.R. 1613.281 (1986). He moved for summary judgment, arguing that the Postal Service had not raised his alleged failure to mitigate damages before the EEOC and therefore was precluded by the doctrine of administrative res judicata from raising the issue in the district court. The district court

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[2] Section 2000e-5(g) is incorporated by reference in the Rehabilitation Act. See 29 U.S.C. 794a(a)(1).

granted summary judgment for petitioner. Pet. App. A22-A46. The court found that "the EEOC serves in a judicial capacity" and renders a "final judgment [on the merits] with which the Postal Service is obligated to comply." *Id.* at A38-A39. Although the district court agreed with the Postal Service that "before the EEOC, there was no inquiry into the reasonable-diligence issue, and there was no calculation of the back pay," *id.* at A37, the court concluded that the Postal Service was "precluded from raising the reasonable-diligence issue if it could have raised it in the administrative proceeding," *id.* at A39. The court held that "[t]he exact construction of the back-pay award [was] a proper subject of the EEOC proceedings," *id.* A40-A41, and found "no legislative policy that would favor separate, collateral review of the reasonable-diligence issue," *id.* at A42-A43.

4. The court of appeals reversed. Pet. App. A1-A19. The court of appeals agreed with the district court that "[s]ince the EEOC acted in a judicial capacity, any factual determination that it made may be subject to the doctrine of *res judicata*." *Id.* at A12. But the court observed that administrative res judicata would not apply to the EEOC proceedings "in the face of contrary public policy," such as "when it would result in a 'manifest injustice.'" *Id.* at A13 (citing cases). The court concluded that to preclude the Postal Service from raising the mitigation issue in a subsequent enforcement action "would be a 'manifest injustice'" and "would violate the statutory mandate in compliance proceedings brought before the district court [under Section 2000e-5(g)] that '[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.'" *Id.* at A13-A14.

The court of appeals observed that "[t]he proceeding before the EEOC was concerned with a liability determination, and was not necessarily the appropriate forum for a

precise determination of [petitioner's] damages." Pet. App. A14. The court also noted that the applicable regulations "[n]owhere * * * direct the EEOC to determine in that proceeding the specific amount of back pay due the complainant," *ibid.*, nor do they specify "which body [the EEOC or the employing agency] must determine back pay in the first instance," *id.* at A15. Moreover, "in practice, it appears that in typical proceedings the EEOC does not compute back pay in the first instance." *Id.* at A15-A16. The court concluded that to require the EEOC, contrary to its current practice, to compute the specific amount of back pay due in all future administrative appeals "would not foster administrative efficiency," because the initial calculation of back pay involves "matters that can best be considered and determined by the agency which had employed the complainant." *Id.* at A17-A18. Accordingly, the court of appeals vacated the judgment and remanded the case for further proceedings.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, the court of appeals has remanded this case to the district court for further proceedings. Because petitioner may recover the back pay he seeks on remand, interlocutory review of the court of appeals' decision is not warranted.

1. Petitioner contends (Pet. 20-29, 44-60) that the Postal Service should have raised his alleged failure to mitigate damages in the EEOC proceedings on the merits of his discrimination complaint. In petitioner's view, principles of administrative res judicata preclude the Postal Service from raising the mitigation issue in a subsequent enforcement action. Petitioner further contends (Pet. 29-43) that the court

of appeals erred in declining to apply administrative res judicata here on the basis of public policy and to avoid manifest injustice. These contentions are unpersuasive.

a. Administrative res judicata applies "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). See also *University of Tennessee* v. *Elliott*, 478 U.S. 788, 797-798 (1986) (issue preclusion applies to factfinding of administrative bodies acting in a judicial capacity); *Kremer* v. *Chemical Constr. Co.*, 456 U.S. 461, 484-485 n.26 (1982). Although the EEOC acted in a judicial capacity in this case, it did not resolve any disputed issues of fact concerning the amount of back pay due. And because the amount of back pay due generally is determined by the employing agency in the first instance, after the EEOC has issued its decision on the merits, the proceedings before the EEOC did not afford the Postal Service an adequate opportunity to litigate the mitigation issue.

The sole issue before the EEOC was "whether the record supports a finding of no discrimination." Pet. App. A73. The district court expressly found that "[w]hen the present case was before the EEOC, there was no inquiry into the reasonable-diligence issue, and there was no calculation of the back pay owed to [petitioner]."[3] *Id.* at A37. This was consistent with the EEOC's usual practice. As the court of

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[3] Consequently, the district court's suggestion that principles of collateral estoppel (issue preclusion) prevent the Postal Service from raising the mitigation issue in a subsequent proceeding (Pet. App. A35-A38) is plainly incorrect. See Restatement (Second) of Judgments § 27 (1982) (issue preclusion applies to issues "actually litigated and determined" in a prior proceeding).

appeals recognized (*id.* at A15-A17), the EEOC generally does not compute the amount of back pay due a successful claimant. In *Snow* v. *United States Postal Service*, 88 Fed. Eq. Opportunity Rep. (Labor Rel. Press) ¶ 1,030 (Sept. 30, 1987), for example, the EEOC issued an order directing the Postal Service to reinstate an employee and award back pay, and later issued a separate order affirming the Postal Service's denial of back pay for failure to mitigate damages.[4]

The EEOC's procedures focus on resolving claims of discrimination on the merits. See 29 C.F.R. 1613.213-1613.218 and 1613.221-1613.234. The regulations provide that, upon a final finding of discrimination, the Commission may order appropriate corrective action, 29 C.F.R. 1613.234 and 1613.271, which ordinarily should include "[p]ayment * * * on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination." Section 1613.271(a)(4). The employing agency is required to report to the EEOC within a prescribed time that "the corrective action has been taken." Section 1613.234(a). If the employee is dissatisfied with the level of compliance, he is entitled to file a civil suit for enforcement in district court. 42 U.S.C. 2000e-16(c); 29 C.F.R. 1613.281 (1986). See *Moore* v. *Devine*, 780 F.2d 1559, 1563

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[4] Petitioner attempts to distinguish *Snow* by noting that the remedial order in that case directed the Postal Service to award back pay reduced by amounts earned, and the EEOC processed the agency's subsequent back pay determination as an administrative appeal rather than as a compliance report. Pet. 51-53. But the EEOC in *Snow* clearly treated the back pay calculation as a separate stage of the process that followed determination of the employee's claim of discrimination on the merits. In *Gellington* v. *Department of Justice*, 87 Fed. Eq. Opportunity Rep. (Labor Rel. Press) ¶ 1,040 (Apr. 15, 1987), the EEOC considered the mitigation issue on the initial appeal because the employing agency had already found discrimination and the employee's appeal was from the agency's partial denial of back pay for failure to mitigate.

(11th Cir. 1986). As the court of appeals recognized (Pet. App. A17-A18), the practice of deferring calculation of back pay until after a determination on the merits of a discrimination claim promotes administrative efficiency by allowing the EEOC to focus its resources on the claims itself while the employer, in the first instance, performs the largely ministerial task of assembling the information needed to implement the usual remedy of reinstatement and back pay.[5]

Because the EEOC generally does not calculate the amount of back pay due in the first instance, the parties in this case did not have an adequate opportunity to litigate back pay issues before the EEOC. Indeed, petitioner's argument, if taken seriously, would preclude him from recovering any back pay because he failed to present evidence concerning the amount of back pay due. See *Taylor* v. *Philips Indus., Inc.*, 593 F.2d 783, 787 (7th Cir. 1979) ("Under [Title VII's make whole] formula, before the court may award damages, plaintiff must first establish that she has, in fact, sustained an economic loss from defendant's discrimination. * * * Not until the plaintiff establishes what she contends are her damages does the burden of going forward to rebut the damage claim or to show plaintiff's failure to mitigate damages, fall on defendant."). Accord *Horn* v. *Duke Homes Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 606 (7th Cir. 1985) (back pay ordinarily is granted Title VII plaintiffs, but "plaintiff has the burden of proving the

[5] Other federal remedial schemes also provide for the calculation of back pay in a separate stage of the proceedings, following a determination of liability. The National Labor Relations Board's regulations promulgated under the National Labor Relations Act (on which Title VII's back pay remedy was expressly modeled, see *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 (1975)), provide for calculation of make-whole damages at a later stage of the proceedings. See 29 C.F.R. 102.52-102.59. The Merit Systems Protection Board also typically resolves back pay issues at a separate stage. See *Frazier* v. *United States Postal Service*, 26 M.S.P.B. 584, 585-586 (1985).

damages caused her"); *Rasimas* v. *Michigan Dep't of Mental Health*, 714 F.2d 614, 623 (6th Cir. 1983); *Marks* v. *Prattco, Inc.*, 633 F.2d 1122, 1125 (5th Cir. 1981). In short, the doctrine of administrative res judicata does not apply to questions concerning the amount of back pay due, because the EEOC's decision did not "resolve[] disputed issues of fact" on that issue, and the parties did not "have * * * an adequate opportunity to litigate" those issues in the prior administrative proceeding, *Utah Constr. & Mining Co.*, 384 U.S. at 422.[6]

There is no merit to petitioner's contention (Pet. 20-29) that the procedure followed in this case permits a federal employer to overrule a back pay remedy ordered by the EEOC. The employer is bound by the EEOC's finding of discrimination. See 42 U.S.C. 2000e-16; *Moore* v. *Devine*, 780 F.2d at 1562. The employer's role is limited to making the initial calculation of the amount of back pay due. If the employee disputes the calculation, he has a right to seek resolution of that dispute by filing an enforcement action in district court (or, under current regulations, by petitioning the EEOC for enforcement of its order, see note 6, *supra*). Thus, contrary to petitioner's assertions (Pet. 20-21, 28-29), the decision in this case does not conflict with decisions holding that the EEOC's final decision in federal sector employment discrimination cases is binding on the employing agency. See *Haskins* v. *Department of Army*,

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[6] In 1987, after the events at issue in this case, the EEOC issued supplemental regulations that make it even clearer that compliance issues, including mitigation, generally are treated as separate from the merits of a discrimination complaint. The regulations establish a formal procedure by which a claimant may petition the EEOC for enforcement of a remedial order, and the EEOC may conduct further fact-finding. See 29 C.F.R. 1613.237-1613.239. Because it is now clear that federal employees may return to the EEOC for resolution of compliance issues, petitioner's contentions are of no continuing significance.

808 F.2d 1192, 1200 (6th Cir. 1987) (EEOC determination "must be reviewed [by a court in an enforcement action] in the context that it was made; facts which were not resolved by the EEOC in making such a determination cannot be read into such a finding upon a claimant's demand"). See also *Houseton* v. *Nimmo*, 670 F.2d 1375 (9th Cir. 1982); *Pecker* v. *Heckler*, 801 F.2d 709 (4th Cir. 1986).

b. Because principles of administrative res judicata do not preclude the Postal Service from raising petitioner's alleged failure to mitigate damages in an enforcement action, there is no need for this Court to consider petitioner's additional contention (Pet. 29-44) that the court of appeals should not have recognized an exception to administrative res judicata based on public policy and the avoidance of manifest injustice. But even if administrative res judicata ordinarily would apply here, the court of appeals' decision would not warrant further review.

In *Federated Dep't Stores* v. *Moitie*, 452 U.S. 394, 401 (1981), this Court rejected "public policy" and "simple justice" as reasons for excepting from the effects of res judicata parties who, for tactical reasons, elected not to appeal a lower court judgment. The lower court in *Moitie* had recognized that "strict application of the doctrine of *res judicata* would preclude * * * review of the instant decision," *id.* at 397 (quoting *Moitie* v. *Federated Dep't Stores, Inc.*, 611 F.2d 1267, 1269 (9th Cir. 1980)), yet nevertheless declined to apply the doctrine. This Court held that the concededly applicable doctrine of res judicata should have been applied, because the ends of justice are "achieved when a complex body of law developed over a period of years is evenhandedly applied," and because exceptions to pertinent law should not be invoked based on "any individual judge's ad hoc determination of the equities in a particular case," 452 U.S. at 401.

Moitie offers no support for petitioner's position. The court here did not expressly hold that res judicata was

applicable and then decline to apply the doctrine because of an "ad hoc determination of the equities," 452 U.S. at 401. Rather, the court determined that in light of the nature of EEOC proceedings res judicata did not apply to such proceedings. See also *International Harvester Co.* v. *Occupational Health and Safety Review Comm'n*, 628 F.2d 982, 984-986 (7th Cir. 1980) (administrative res judicata does not apply to issues not reached in the previous administrative proceeding).

The court of appeals concluded that to preclude the Postal Service from asserting petitioner's failure to mitigate damages in his enforcement action would force the EEOC to adopt less efficient administrative procedures, Pet. App. A17- A18, and would violate the statutory requirement that back pay must be reduced by the amount which the claimant earned, or with reasonable diligence could have earned, in the back pay period. Pet. App. A13-A14. In the absence of a conflict in the circuits, the court of appeals' decision presents no issue calling for review by this Court.

2. The court of appeals correctly rejected petitioner's claim (Pet. 64-65) that he is a "prevailing party" in his enforcement action for purposes of an award of attorney's fees. A plaintiff is not a prevailing party unless he has achieved some of the benefit sought in bringing the action. *Texas State Teachers Ass'n* v. *Garland Indep. School District*, 489 U.S. 782, 790-792 (1989); *Sullivan* v. *Hudson*, 109 S. Ct. 2248, 2255 (1989). See also *Hanrahan* v. *Hampton*, 446 U.S. 754, 759 (1980). Because petitioner has yet to achieve any of the benefit sought in his enforcement action, his claim for attorney's fees is premature.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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THE SUPREME COURT OF THE UNITED STATES

TERM COMMENCING OCTOBER 1, 1990

SABAT QUINONES CANDELARIO,

PETITIONER

vs.

POSTMASTER GENERAL OF THE UNITED STATES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

Respectfully Submitted,

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REPLY BRIEF

ARGUMENT

The Response Brief to the Petition for Writ of Certiorari filed by the Postal Service did not contradict any of the facts set forth by Quinones in the Petition for Writ of Certiorari and agreed with Quinones' central contention: that "the EEOC's final decision in federal sector employment discrimination cases is binding on the employing agency," Response Brief at 9. Quinones is concerned, however, with five statements of fact and three points of argument in the Response Brief and files this Reply Brief to address them.

1. The Postal Service states, "The Postal Service issued a final agency

decision finding that petitioner's termination was not discriminatory." Response Brief at 2. While this is a true statement, Quinones would like to clarify to the Court that the Postal Service omitted to mention that in issuing its final agency decision, the Postal Service rejected the EEOC administrative judge's findings of fact from the evidentiary hearing that discrimination had occurred and his recommendation to enter the final agency decision in Quinone's favor. Had the recommendation been followed, the Postal Service would have been required to calculate a back pay remedy (which, of course, presupposes that the reasonable diligence issue would have been considered). The amount due would have

been much less than the amount due now, after so many additional years of litigation at both the administrative and court levels. If any party to this action is guilty of failure to mitigate, it is the Postal Service itself which has allowed the clock to keep running while it stubbornly and futilely fought a claim which it knew to be meritorious.

2. The Postal Service also states, "The EEOC neither considered nor determined the amount of backpay due petitioner, and the parties presented no argument or evidence on this question. See Id. at A.37." Response Brief at 2. This is not an accurate statement. What the District Court actually found was "When the present case was before the

EEOC, there was no inquiry into the reasonable diligence issue, and there was no calculation of the back pay owed to Quinones." Pet. App. A.37. There was, however, an EEOC determination that the Postal Service should compute and award an amount of back pay equal to the amount Quinones would have been paid had he not been illegally discharged from the date of that illegal discharge to the date of his reinstatement. It was that determination which Quinones went to the District Court to enforce after the Postal Service spent two years refusing to make the calculation and denying, on the grounds of failure to mitigate, that it was required to award any back pay at all. It wasn't until after the EEOC considered

all of the Postal Service's arguments on the reasonable diligence issue and found the Postal Service to be in non-compliance that Quinones brought this enforcement action in the District Court. The Postal Service ignores the fact that it refused to comply with a final decision it has conceded was binding upon it. See Pet.App. A-84.

3. "Petitoner's submissions showed that...he was a full-time university student for three years." Response Brief at 3. Quinones points out that his matriculation was actually an effort at mitigation: it was required under the Veterans Rehabilitation Program as a condition precedent to being placed in a position substantially comparable to the

one he lost at the Postal Service. This issue was raised by the Postal Service in the EEOC compliance proceedings and was found wanting. The EEOC declined to change its final order requiring the Postal Service to calculate an award of back pay from the date of illegal discharge to the date of reinstatement and found the Postal Service in non-compliance. Pet.App. A-84.

4. The Postal Service went on to state, "Petitioner submitted additional documents....Upon investigation, the Postal Sevice determined that the additional materials were suspect, and again denied petitioner's claim for back pay." Response Brief at 3. Actually, the Postal Service notified the EEOC that it

considered Quinones' documents in support of reasonable diligence suspect without any investigation or foundation at all. It was not until after Quinones commenced this enforcement action in the District Court that the Postal Service made any effort at all to investigate. After the investigation, it still could not be sworn that Quinones had not made all the job getting efforts he claimed to have made. Pet. 16. The Postal Service cannot have it both ways. It cannot, on the one hand, seek to show this Court all the arguments it raised before the EEOC in support of its decision not to comply with the EEOC order requiring it to calculate back pay, and on the other hand, seek to argue to this Court, as it does several times in

its Response Brief, that it did not have an adequate opportunity to litigate the issue of mitigation before the EEOC.

5. At paragraph 4 of the Statement of Facts, the Postal Service summarizes the 1st Circuit opinion as follows: "The court of appeals agreed with the district court that '[s]ince the EEOC acted in a judicial capacity, any factual determination that it made may be subject to the doctrine of res judicata.'...But the court observed that administrative res judicata would not apply to the EEOC proceedings 'in the face of contrary public policy,' such as 'when it would result in a 'manifest injustice' and 'would violate the statutory mandate in compliance proceedings brought before the

district court [under Section 2000e-5(g)] that 'interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." This is an admirably accurate summary of what the 1st Circuit said. The problem is two-fold. First, the Postal Service later argues that the 1st Circuit did not really hold that the doctrine of res judicata was applicable and that therefore this Court does not have to consider whether public policy and manifest injustice are exceptions to it. Response Brief at 10-11. With all due respect to our worthy opponents, that is the kind of governmental double speak from which revolutions are fomented. Once

having presented as fact that the 1st Circuit held that the doctrine of res judicata would have been applicable but for the exceptions of public policy and manifest injustice, the Postal Service cannot then argue that this Court should make believe the 1st Circuit never said it so it won't have to decide whether or not the 1st Circuit should have said it. The second problem has to do with basic error in the 1st Circuit opinion, which is propounded by the Postal Service, concerning the nature of the action brought in the District Court and the significance of Section 2000e-5(g). First of all, there is no such thing as "compliance proceedings brought before the District Court." Response Brief at 4.

Compliance proceedings occur before the EEOC. When the EEOC is unable to compel compliance, an enforcement action is brought before the District Court. Second of all, Section 2000e-5(g) does not constitute a "statutory mandate in [enforcement] proceedings brought before the District Court." Section 2000e-5(g) is a statutory mandate in de novo proceedings on the merits brought to the district courts by employees who have been unsuccessful at the EEOC. If they are then successful at the District Court in a de novo trial on the merits, the District Court must follow Section 2000e-5(g) in fashioning the remedy. Section 2000e-5(g) is not applicable to those federal employees who were successful at

the EEOC, such as Quinones, and who come to the District Court merely to enforce the remedy which has already been determined due them. Since the District Court merely has to enforce the remedy and does not have to fashion the remedy, it does not have to be concerned with Section 2000e-5(g). Quinones has never complained about the remedy fashioned by the EEOC, and therefore, the District Court did not have to comply with the Postal Service's request to review it de novo.

6. The Postal Service argues that "Because petitioner may recover the back pay he seeks on remand, interlocutory review of the court of appeals' decision is not warranted." This is rather an ingenuous argument. If Quinones thought

it was that simple, he would not have brought this petition. The truth is if Quinones could recover the back pay he seeks on remand, there would have been no point in reversing the summary judgment. Is the Postal Service stipulating that on remand it will merely repeat its stipulation as to the amount due it made at the first hearing on damages? Or is the Postal Service stipulating that even if it presents evidence on the reasonable diligence issue on remand, it will not prevail so Quinones will still get the back pay remedy he seeks on remand? What was the point of the appeal to the 1st Circuit? How does this encourage administrative efficiency or judicial economy? Or, on remand, must the District

Court hold that as the Postal Service, in the first instance, calculated that nothing was due, refuse to enforce the EEOC final decision requiring back pay to be awarded from the date of unlawful discharge to the date of reinstatement? This alternative would obviously conflict with the decisions holding that enforcement is mandatory. Haskins v. U.S. Department of Navy, 808 F.2d 1192 (6th Cir. 1987); Houston v. Nimmo, 670 F.2d 1375 (9thCir.1982); Moore v. Devine, 780 F.2d 1559 (11th Cir. 1986); Pecker v. Heckler, 801 F.2d 709 (4th Cir. 1986). It would also negate the Postal Service's argument that Quinones could recover the back pay he seeks on remand. Or is the remand all the way back to the EEOC?

Unlike the National Labor Relations Board and the Merit Systems Protection Board, the EEOC regulations do not provide a separate stage for the resolution of back pay issues after a decision limited to the merits is issued. At the EEOC, the final decision on the merits includes a final decision on the remedy of back pay. Pet.App. A-78. This Court must review the 1st Circuit opinion in order to halt the vicious cycle of remands and never-really-final decisions which impede every federal employee's journey toward recieving a just remedy for the discriminatory wrongs done him, and in order to clarify, once and for all, what the relative duties of the federal agencies, EEOC and district courts are in

the process, so that never again does an outmanned employee like Quinones have to endure what is now twelve years of frustrating efforts to obtain justice.

7. The Postal Service also argues that the EEOC "did not resolve any disputed issues of fact concerning the amount of back pay due....[and] the proceedings before the EEOC did not afford the Postal Service an adequate opportunity to litigate the mitigation issue." Respondent's Brief at 6. This is simply not true. The EEOC made a determination that back pay was due to Quinones from the date of his unlawful discharge to the date of his reinstatement. The Postal Service had three opportunities to litigate the mitigation issue before that determination

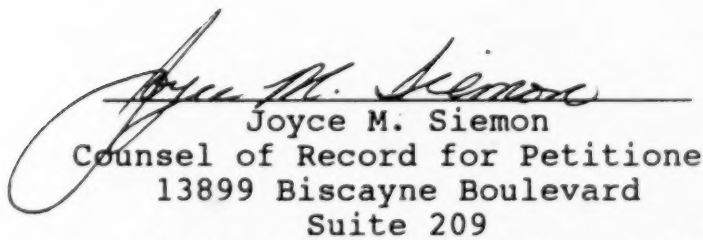
was made: at the adjustment of the complaint negotiations; during pre-hearing discovery proceedings; and at the evidentiary hearing. After the determination was made, the Postal Service had a fourth opportunity to raise the issue: by filing a motion for reconsideration. The Postal Service failed to avail itself of any of those opportunities. The Postal Service did, however, send several letters to the EEOC presenting its failure to mitigate defenses to complying with the EEOC determination. The EEOC declined to accept those defenses, declined to change its determination that Quinones should be awarded back pay from the date of unlawful discharge to the date of reinstatement,

and found the Postal Service in non-compliance. Pet.App. A-84. Because the Postal Service did have adequate opportunity to litigate the mitigation issue at the EEOC, the doctrine of res judicata clearly applied, Cromwell v. County of Sac, 94 U.S. 351 (1876), and the 1st Circuit erred in holding that public policy and manifest injustice were exceptions to it. Federated Department Stores, Inc. v. Moitie, 452 U.S. 392 (1981).

8. Lastly, the Postal Service agrees that a plaintiff is a prevailing party when he has "acheived some of the benefit sought in bringing the action." Response Brief at 11. Quinones was successful at the District Court in establishing that he

was entitled to an award of back pay and he was also successful in having the Postal Service calculate and stipulate to the amount of back pay due. As the Postal Service has stipulated in its Response Brief that on remand Quinones may recover the back pay he seeks, this Court should grant the Writ, quash the 1st Circuit opinion, and reinstate the District Court judgments awarding Quinones the stipulated amount of back pay due and the attorneys' fees awarded.

Respectfully Submitted,



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